McCullough Environmental Services, Inc. *and* Teamsters Local Union No. 891, affiliated with the International Brotherhood of Teamsters, AFL–CIO.[1] Cases 15–CA–11046 and 15–CA–11255

February 20, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 14, 1991, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.

The judge found that the Respondent, through Supervisor Bunyard, unlawfully threatened to discharge certain employees because they supported the Union. We disagree.

In June 1989,[3] Field Maintenance Supervisor Bunyard asked employee Michael Langston if he would like to work in the field. Bunyard said that ''he didn't feel like he and his crew was going to make it.'' Three or 4 days later, Langston asked Bunyard about the matter, and Bunyard told him that Maintenance Supervisor Eckels ''wasn't going to let me [Langston] go out there because I was a good worker, and there was a lot of stuff going on out there in the field that they didn't want me involved in.'' After the Respondent suspended field crew member Richard Harris, who had been identified by the Respondent as the leading union adherent, Langston talked to Bunyard again, and Bunyard told him to hold on a couple more weeks and he would be out there.

The judge also related conversations between Supervisor Eckels and employee Wells, and between Bunyard and field crew member Spann. Eckels asked Wells whether Harris had talked to him about the Union the day that Wells worked in the field, and told Wells that he would go out in the field one day and ''they'd change me [Wells] over.'' In addition, Spann testified that Bunyard said that Bunyard ''didn't know if I had anything to do with the union or not, but he was aware that Richard Harris was employed at G.E., and they had a big union over there, and he believed that Richard Harris was probably the man.''

The judge found that the above evidence showed that Bunyard suggested to employees from the time he became supervisor that he would discharge members of the field crew. The judge noted that both Bunyard and his superior, Eckels, were making contemporaneous comments to the employees to the effect that Richard Harris was suspected of being the ''big union man'' and that the other members of the crew, Spann and Collins, also supported the Union because of the influence of Harris. Thus, the judge found that the Respondent threatened to fire the field crew because they supported the Union.

Contrary to the judge, we find that the quoted comments to Langston occurring within days of Bunyard's promotion to supervisor were not sufficiently linked to the field crew's union activity to constitute an unlawful threat to discharge the field crew. It is clear from Bunyard's statements that the Respondent was dissatisfied with certain conduct taking place in the field. Upon assuming his position on June 6, Bunyard viewed it as his responsibility to rectify certain of these poor work practices. In this regard, the record reflects that the field crew engaged in a considerable amount of ''goofing off'' during the work day, and we are not persuaded the ''stuff'' to which Bunyard was referring was other than ''goofing off.'' Accordingly, we shall dismiss this allegation of the complaint.

ORDER

The National Labor Relations Board orders that the Respondent, McCullough Environmental Services, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Reprimanding and discharging employees because of their union activities, or because they file charges with the Board and testify at Board proceedings.

(b) Implementing a rule requiring employees to sign disciplinary actions or be discharged because of their union activity.

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[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent asserts that the judge's resolutions of credibility, findings of facts, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. There is no basis for finding that bias and partiality existed merely because the judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), ''[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.'' Further, it is the Board's established policy not to overrule a judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We find no basis for reversing the judges findings.

[3] All dates are in 1989.

(c) Promulgating and enforcing a rule prohibiting employees from soliciting on behalf of the Union.

(d) Interrogating employees about their union activities.

(e) Creating the impression that the employees' union activities are under surveillance.

(f) Threatening employees with reductions of working hours, more onerous working conditions, and other unspecified reprisals if they select the Union as their collective-bargaining representative.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer Richard Harris, L. C. Spann, and Lonnie Collins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Rescind the unlawful disciplinary actions issued to Richard Harris, Lonnie Collins, L. C. Spann, Bernard Bennett, and James Varnado and remove from its files any reference to the unlawful discharges and/or disciplinary actions and notify the employees in writing that this has been done and that the discharges or disciplinary actions will not be used against them in any way.

(c) Rescind the discriminatory rule change regarding signing of reprimands.

(d) Rescind the unlawful rule prohibiting solicitation for the Union.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Jackson, Mississippi, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT reprimand or discharge you because of your union activities, or because you file charges with the Board and testify at Board proceedings.

WE WILL NOT implement rules requiring you to sign disciplinary actions or be discharged because of your union activities.

WE WILL NOT promulgate or enforce a rule prohibiting you from soliciting for the Union.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT threaten you with reductions of working hours, more onerous working conditions, or other unspecified reprisals for selecting the Union as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Richard Harris, L. C. Spann, and Lonnie Collins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL rescind the unlawful disciplinary actions issued to Richard Harris, Lonnie Collins, L. C. Spann, Bernard Bennett, and James Varnado, and remove from our files any reference to the unlawful discharges

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

and/or disciplinary actions and notify the employees in writing that this has been done and that the discharges or disciplinary actions will not be used against them in any way.

WE WILL rescind the discriminatory rule change regarding the signing of reprimands.

WE WILL rescind the unlawful rule prohibiting solicitation for the Union.

MCCULLOUGH ENVIRONMENTAL SERVICES, INC.

Denise Frederick, Esq. and *Ronald K. Hooks, Esq.*, for the General Counsel.

Armin J. Moeller Jr., Esq. and *David Thomas, Esq.*, of Jackson, Mississippi, for the Respondent.

Samuel Morris, Esq., of Memphis, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Jackson, Mississippi, on April 23 and 24 and November 28 and 29, 1990. The complaint in Case 15–CA–11046 issued on December 28, 1989. It was based on a charge filed on November 1 and amended on December 28, 1989. The complaint in Case 15–CA–11255 issued on July 23, 1990. It was based on a charge which was filed on June 14 and amended on July 12, 1990. On August 1, 1990, those complaints were consolidated into the instant proceedings.

The complaints allege that Respondent violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (Act).

Respondent admitted the commerce allegations. Respondent admitted that at material times, it is and has been, a Texas corporation, engaged in the business of operating, maintaining, and managing water and sewage treatment plants for various municipalities throughout the United States including water and sewage treatment facilities located in Jackson, Mississippi. Respondent admitted that during a representative 12-month period, it provided services in excess of $50,000 to customers located outside the State of Texas and that it is now, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act).

Respondent admitted that the Charging Party (Union) is a labor organization within the meaning of Section 2(5) of the Act.

It is alleged that Respondent engaged in several independent violations of Section 8(a)(1) of the Act at various times between July 5 and 20, 1989; that Respondent discharged employees Lonnie Collins on July 11, Richard Harris on July 12, L. C. Spann on July 25, and Brian King on October 2, 1989; reprimanded Bernard Bennett on July 10, 1989; promulgated and maintained from June 29, 1989, a rule requiring employees to sign disciplinary notices; and promulgated on July 11, 1989, a rule requiring employees to take breaks and lunch periods only at times specified by Respondent, in violation of Section 8(a)(1) and (3) of the Act; and that Respondent issued written warnings to employee James Varnado on March 9 and June 1, 1990, in violation of Section 8(a)(1), (3), and (4) of the Act.

I.

Section 8(a)(1)

1. Supervisor Robert Tim Bunyard

During the hearing the parties stipulated that Tim Bunyard has been a supervisor of Respondent within the meaning of Section 2(11) of the Act, from 12 p.m. on June 5, 1989.

a. *Interrogation and creating the impression of surveillance*

Tommy Wash, who, at the time, was a laboratory technician, testified that as he was leaving a meeting while at work at Respondent's plant, about a month before the July 11, 1989 election, Tim Bunyard followed him down the hall and yelled to Wash, ''hey, union man. Hey, union man.''

Wash testified that Bunyard had been promoted to supervisor before the above incident.

General Counsel argued that the above remarks by Bunyard, were calculated to elicit information concerning Wash's union sentiments and constituted interrogation and created the impression of surveillance, citing *National Gypsum Co.*, 293 NLRB 1138 (1989).

L. C. Spann testified that he had several conversations with Supervisor for the Field Facilities Robert Tim Bunyard about the Union. Spann testified that in the second of those conversations, which he recalled, occurred about 3 weeks before the election in Bunyard's office:

> [Bunyard] told me that he didn't know if I had anything to do with the union or not, but he was aware that Richard Harris was employed at G.E., and they had a big union over there, and he believed that Richard Harris was probably the man.

Supervisor Tim Bunyard denied that he talked to any employee about the Union after he became supervisor on June 5, 1989.

I have determined that the testimony of Tommy Wash and L. C. Spann should be credited. Both Wash and Spann demonstrated good demeanor. Robert Tim Bunyard, on the other hand, appeared evasive and inconsistent in his testimony. An example of his inconsistency is as follows:

> Q. Were you concerned as to whether the union was going to get into the plant?
>
> A. Not so.
>
> . . . .
>
> No, sir. I was not over-concerned of the union.
>
> Q. (By Mr. Hooks): You were not concerned that the union might win?
>
> A. No, sir. I work there to do a job, and I can adapt as it may be.
>
> Q. So it didn't matter to you one way or the other.
>
> A. Well, yes, sir; it mattered. It mattered by the fact that the Company wished—wanted us to do what—you know, what we—what they wanted us to do. I am a Company man; I follow Company rules. I abide by the Company's wishes and what they want me to do.

Q. And what did the Company want you to do?

A. They want me to do my job to the best of my ability.

Q. But with regard to the union, what did the Company want you to do?

A. They didn't want me to do anything. They never asked me to do one thing or another.

Subsequently, Bunyard testified:

Q. And what was your position as to what you thought as to the fact that the union might come in?

A. What do you mean what was my position?

Q. Were you for it or against it?

A. I definitely wasn't for it. I had just left a job, been laid off from a job in Texas that was union-affiliated, but I had heard nothing from the union stating what their grounds were. I had no basis to base—to give a knowledgeable explanation of how I felt on it. There was not basis; I didn't hear anything about it.

The credited evidence shows that Bunyard interrogated both Wash and Spann. At that time neither of those employees was a known union supporter. The comments to Spann posed an inquiry as to whether Bunyard should believe that Spann was a union man and thereby invited a response from Spann. Additionally, Bunyard's comments to Spann held out the impression that Bunyard was engaged in surveillance of the employees' union activities. *Krona 60 Minute Photo*, 277 NLRB 867 (1985); *Rossmore House*, 269 NLRB 1176 (1984); *Tom's Foods, Inc.*, 287 NLRB 645 (1987).

b. *Threatening employees with reduction in hours*

As mentioned above, L. C. Spann testified that he had several conversations with Supervisor for the Field Facilities Tim Bunyard about the Union. Spann recalled that the third of those conversations occurred about 2 to 3 weeks before the election in Bunyard's office. Richard Harris and Lonnie Collins were present along with Bunyard and Spann:

Bunyard, he said that the company didn't want the union and was going to fight it, and he said that if by chance we did get the union in that our work hours could be cut to less than forty hours a week.

Tim Bunyard denied that he threatened employees with reduction in work hours if the employees selected the Union.

As shown above, I credit the testimony of Spann and discredit the testimony of Bunyard. I find that the credited evidence proved that Supervisor Bunyard threatened to cut employees' work hours to less than 40 hours a week if the employees selected the Union.

c. *Threatening that it would fire other employees*

Michael Anthony Langston, a former employee of Respondent, testified that he had a conversation with Tim Bunyard shortly after Bunyard became supervisor:

[Bunyard] asked me if I would be—you know, how would I like working out into the fields, and I replied to him that it sounds great.

. . . .

He said because he didn't feel like he and his crew [Lonnie Collins, Richard Harris and L. C. Spann] was going to make it.

Three or 4 days later, Langston talked again with Bunyard:

After three or four days had gone by, I went to him and asked him what was going on, and he told me that Bill [Eckels] and them wasn't going to let me go out there because I was a good worker, and there was a lot of stuff going on out there in the field that they didn't want me involved in.

After Respondent suspended Richard Harris, Langston talked to Bunyard:

I went to him and asked him about—again about going out into the fields, and he said just hold on a couple more weeks, said I'd be out there.

In addition to the above testimony of Langston, the testimony of former employee Derrick Wells, appears to show relevance. According to Wells, he had the following conversation with William Eckels at work on July 8, 1989:

[Eckels] told me—he asked me did Richard Harris talk to me about the union that day I was out there. I told him I was trying to stay out of it. He told me I'd go out in the field one day and they'd change me over.

L. C. Spann testified that in the second of several conversations with Supervisor Bunyard, which he recalled, occurred about 3 weeks before the election in Bunyard's office:

[Bunyard] told me that he didn't know if I had anything to do with the union or not, but he was aware that Richard Harris was employed at G.E., and they had a big union over there, and he believed that Richard Harris was probably the man.

The field crew at the time of the above conversations involving Langston, Wells, and others, consisted of Richard Harris, L. C. Spann, and Lonnie Collins.

As shown below, Bunyard testified that he set out to straighten out the field crew when he took over as supervisor on June 5, 1989. However, the above evidence shows that Bunyard held out to employees from the onset of his supervisory authority, that he would discharge members of the field crew. Both Bunyard and his supervisor, William Eckels, were making contemporaneous comments to the employees to the effect that Richard Harris was suspected as being the big union man and, as shown below, that the other members of the crew, Spann and Collins, also supported the Union because of the influence of Harris.

I find, in agreement with General Counsel, that the record supports the allegation that Bunyard threatened to fire other employees because those employees supported the Union.

2. Maintenance Supervisor William Eckels

Interrogation and threatening more onerous working conditions

Former employee, utility man Derrick Wells, testified about a conversation he had with his Supervisor William

Eckels while he was at work for Respondent on July 5, 1989:

> [Eckels] approached me and asked me, you know, what do I think about the union, something to that effect. And then he said—
>
> . . . .
>
> I said I was trying to stay out of it.
>
> . . . .
>
> Well, he told me—he said—told me that if the union was elected in that things were going to get a lot tougher around there. . . . He said all privileges would be cut out. And then he said that all the guys that voted for the union would wash their cars down at the union hall.

Wells testified that Respondent had a practice of permitting employees to wash their cars at work while on break.

Wells had another conversation with Eckels at work on July 8:

> [Eckels] told me—he asked me did Richard Harris talk to me about the union that day I was out there. I told him I was trying to stay out of it. He told me I'd go out in the field one day and they'd change me over.

William Eckels denied that he has ever interrogated employees about their union membership. Eckels testified that some employees, including Mose Bishop, came to him and volunteered information about the Union.

Eckels testified as follows regarding the question of threatening more onerous working conditions:

> I made a statement like saying that things would get harder, meaning that they would have to go by what their job description meant and things.
>
> Like we have one man that can hardly read or write, and he is a mechanic. Now, if a job description is written up, he is going to have a tough time following something like that. That is what I meant by it. There is no way I could make their job harder. I got to find work now for them.
>
> . . . .
>
> Well, I don't think there was ever a car-washing privilege. I mean, we had the facilities there, and they were free to use that, just like they borrowed tools and—you know, for their home use and stuff.
>
> But I—yes. I made a statement. I don't know if it was joking; I don't remember who it was to now. I said they can go to the union hall and wash their car, because, you know, it was mentioned about that. And it is true I had picked up the hoses, but I had picked up the hoses a dozen times before that.

Eckels went on to testify that one of the reasons why he picked up the hoses was to prevent another outfit from washing off their trucks and leaving the mud off their trucks. Eckels said that employees still wash their cars and that he has never prevented employees from washing their cars.

I was impressed with the demeanor of William Eckels and Derrick Wells. I am convinced that both were relating the truth as recalled by them. In view of that determination I am unable to discredit the testimony of Eckels in the few instances where there is a clear conflict between his testimony and the testimony of Wells. With that in mind I am not convinced that Eckels interrogated Wells.

However, I do find that Eckels threatened that working conditions would become more onerous if the employees selected the Union. That is the message Eckels conveyed to Wells despite Eckels' personal feelings about the matter.

In considering an 8(a)(1) allegation, it is important to keep in mind that that section of the law is concerned with rights of employees. In that regard motivation of the employer must take a back seat to the inquiry into what was communicated to the employees. Here the message to the employees was a simple one. The employees were being informed that things would get tougher if they selected the Union.

3. Supervisor Kelvin Peters

July 12, 1989: Laboratory Technician Chester Hicks testified about a conversation he had with Supervisor Kelvin Peters while he was at work on July 12, 1989 (the day after the NLRB-conducted election):

> Well, we come out of the lab. He [Peters] told me to come go with him. We went out of the lab and got on the golf cart, and we proceeded to go out to the Parshall flum. Nothing was said on the way out there. And when we got out there he said, Chester, ''I hate a liar.'' I said, ''What do your mean, Kelvin?'' He say, ''All of this time you've been acting as thought you didn't know anything about a union around here and I see that you're supporting it.'' And he said, ''As a matter of fact, an organizer.'' I said, ''Why do you want to place me as an organizer?'' He say, ''Because back in the conference room yesterday you got up in front of the T.V.'' I said, ''Well, I don't see why you want to judge me in that manner.'' And then I told him, I said, ''Kelvin, you don't come to work telling us what you and your wife do at home.''
>
> And at that point, Kelvin got angry, and his voice went from a monotone to a higher tone. Then he said, ''Well, I'll tell you this: If you all think that you all are going to get this union in here like that, you all have another thought coming.'' He said, ''Because McCullough will look down on you,'' me, that is, ''and every other guy that went union.'' And I said, ''Well, Kelvin, that's why all the guys around here feel that we needed a union in here because McCullough's not looking too well on us now.''
>
> . . . .
>
> The only thing he said then was that, ''Well, I'm through with it, and I hate a liar.'' I said, ''Well, I hate a liar, too.'' And I said, ''I'm through.''

Laboratory Supervisor Kelvin Peters testified that he talked with Hicks because he was concerned with Hicks' justification for lying to him. According to Peters, Hicks had told him that he was not involved with the Union. Peters was concerned with whether Hicks was truthful rather than with any union involvement.

General Counsel cited *Northern Wire Corp*., 291 NLRB 727 (1988), in arguing that the above conversation included a threat of unspecified reprisals by Respondent, because of its employees' union activities.

Again, as shown above, Section 8(a)(1) of the Act does not depend on a determination that Respondent acted out of improper motivation. Here, Chester Hicks was strongly criticized by his supervisor because of his role in the union campaign.

Employees are protected in their efforts in favor and in opposition to unions, even to the extent of misrepresenting their roles in that regard.

I find that Kelvin Peters threatened Chester Hicks with reprisal because of Hicks' union activities in violation of Section 8(a)(1).

4. Supervisor David Canizaro

July 19, 1989: Respondent, in its answer to the complaint in Case 15–CA–11046, admitted the supervisory allegations regarding David Canizaro. Although Respondent denied the supervisory allegations regarding David Canizaro in its 15–CA–11255 answer, it stipulated that both Canizaro and Andrew Hawthorne were supervisors during the March to July 1990 period.

Tommy Wash testified that shortly after the July 11, 1989 election he made a comment referring to OSHA and was called into the office of Field Supervisor David Canizaro. Canizaro told Wash that he was in trouble. Canizaro went on to tell Wash,

> I told you that since this union stuff that there was going to be some changes. . . . I told you to leave that union stuff alone.

Wash testified that on the Monday before the election,

> I came down to get my check, and [Canizaro] rode the elevator down with me, followed me to the doorway where I was exiting to my vehicle, and he made the statement while we were going down the hall that, ''I heard that y'all had a big meeting yesterday.'' I said, ''I don't understand what you're talking about. Wherever you got your information from, you need to talk to those people.'' And I kept walking, and as I kept walking towards my vehicle out the door, he was standing at the door with the door open. He said, ''Y'all need to leave that union stuff alone.''

General Counsel argued that the above conversations included a threat of unspecified reprisals because of the employees' union activities.

I credit the testimony of Wash which was uncontested. Canizaro was holding out to Wash that bad things would happen to those employees that did not leave the Union alone. That conduct constitutes violation of Section 8(a)(1).

5. Project Manager Robert Maines

As shown below under the topic ''Bernard Bennett,'' on July 10, 1989, Project Manager Robert Maines issued the following written warning to Lead Operator Bernard Bennett:

> The following was reported to me on this date, at 7:15 A.M.:
>
> At 7:05 A.M., you approached Utilityman, Ken Thomas and solicited his support for the Teamsters Union. This occurred during normal working hours for both yourself and Mr. Thomas. You were not only negligent toward your own duties, but you also obstructed Mr. Thomas in the performance of his duties. As the person in charge of your shift, you are looked upon and expected to set an example for other employees in the performance of your work. You have been negligent toward your work responsibilities by taking the time to wait around for an opportunity to solicit this individual; whereas, you were supposed to be monitoring the facility and performance of those workers under your direct supervision. This will not be tolerated in the future. You are instructed to cease conversation with personnel other than in the performance of your job. As well, you should be informed, soliciting is not allowed on the premises of the work project.
>
> This is a written reprimand, which will placed in your personnel file.

Bernard Bennett testified that Respondent did not have a no-solicitation rule or a no-talking rule, in effect before July 10. Bennett testified that he had engaged in solicitation before that date and he had observed supervisors engage in solicitation. According to Bennett, it was commonplace for employees to talk to each other while working. Bennett testified that he oftentimes talked with others including Supervisors Jackie Kiser and Andrew Hawthorne, during work about nonwork related subjects.

Laboratory Technician Chester Hicks testified that employees were never prohibited from soliciting on the job and, as late as during the fall 1989, he sold cookies, church tickets, and tickets for his little girl's school at the plant, during worktime. Hicks testified that he solicited the above things to employees including Supervisors Kelvin Peters and David Canizaro. Hicks testified that other employees also solicited on the job.

Tommy Wash testified that he was unaware of any rule prohibiting solicitation in the Jackson facility and that he sold ''raffle tickets, baseball tickets, certain functions, barbecues, things like that.''

James Varnado testified that Respondent did not have a rule which prohibited solicitation and that he sold raffle tickets to other employees while at work, during the spring of 1989. Varnado testified that other employees' solicitations including sale of fish plates and girl scout cookies.

Maintenance Mechanic Mose Bishop testified that he is unaware of any rules prohibiting solicitation. Bishop testified that employees including Supervisor William Eckels, engage in solicitation which included selling candy, cookies, and raffle tickets on the job.

Maintenance Electrician Willie Wilson testified that employees have been permitted to solicit during nonbreak worktime. Wilson said that he has purchased tickets at work from employees including James Varnado and Tommy Wash and candy from Supervisor William Eckels. On cross-examination, it was brought out that Wilson indicated in his prehearing affidavit that all the incidents of solicitation in the plant occurred in 1986 and 1987.

Former employee Michael Anthony Langston testified that Respondent did not have a rule against soliciting and that Ken Thomas sold boots to him while at work around March or April 1989. Langston testified that Thomas also sold raffle tickets and that Thomas solicited the sale of a number of

things to employees including Supervisor William Eckels. Thomas engaged in solicitation during nonbreak times.

Respondent argued in its brief that this allegations is based on an inaccurate statement contained in the reprimand letter to Bennett and that that reprimand was a private matter which was never promulgated to employees.

Apparently Respondent is referring to the following statement in Bennett's reprimand in its contention that the statement was inaccurate:

> You are instructed to cease conversation with personnel other than in the performance of your job. As well, you should be informed, soliciting is not allowed on the premises of the work project.

Perhaps, as Respondent argues, the above statements were inaccurate. However, there was no showing that Respondent ever repudiated the statements or that it ever advised any employee including Bennett, that the statements were inaccurate.

As to Respondent's contention that the reprimand was private, the record shows that the reprimand was communicated to at least one employee. Bernard Bennett was advised that employees were in effect prohibited from talking or soliciting for the Union. As shown below, I find that Bennett was an employee and not a supervisor during 1989.

The law does not require that illegal activities must involve more than one employee and, of course, there is no guarantee that a communication like the one involved here, was not conveyed to more employees.

I find that the above evidence proved a violation of the Act by Respondent's actions in enforcing an illegal no-solicitation and no-talking policy against its employees' union activities. *299 Lincoln Street, Inc.*, 292 NLRB 172 (1988), and *Cannon Industries*, 291 NLRB 632 (1988); *Middletown Hospital Assn.*, 282 NLRB 541 (1986); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); cf. *Asociacion Hospital Del Maestro*, 283 NLRB 419 (1987); *Machinists District Lodge 91 v. NLRB*, 814 F.2d 876 (2d Cir. 1987), for discussion of the issue in cases where no violation was found.

II.

A. *Section 8(a)(1) and (3)*

The complaint alleged that Respondent changed two rules at the height of its employees' union campaign in violation of Section 8(a)(1) and (3) of the Act.

The union organizing campaign occurred during the spring and summer of 1989. On April 28, 1989, the Union filed its petition in Case 15–RC–7452. A representation hearing was held on May 17, 1989. An election was held on July 11, 1989. The Union received a majority of the votes in that election.

B. *The Rule Requiring Employees to Sign Disciplinary Notices*

It is alleged that Respondent violated sections of the Act by its promulgation of a new rule requiring employees to sign written reprimands.

There was an evidentiary dispute regarding whether on or about June 29, 1989, Respondent changed its policy on having employees sign written reprimands. As shown below, I find that Respondent did change its established policy from one of telling its employees to sign written reprimands, to one of discharging employees if they refused to sign written reprimands.

Robert Maines testified that Respondent has had a policy since 1979 of requiring employees to sign written reprimands. Maines acknowledged that, in a couple of instances, employees have refused to sign reprimands. However, according to Maines, those instances have involved absenteeism.

Although Maines acknowledged that Respondent's president wrote to all Respondent's facilities on June 28, 1989, and that he wrote his supervisors on July 5, 1989, he testified that those letters did not involve a change in the policy of requiring employees to sign reprimands. The letters were, according to Maines, remainders of the established policy.

However, Maines admitted that the June 28, 1989 letter from President Jerry Mitchell and Maines' July 5, 1989 memo, were the only two documents which reflect Respondent's policy on signing written reprimands.

Respondent's president, Jerry C. Mitchell, wrote its facilities, including Jackson, Mississippi, on June 28, 1989:

> It has come to my attention that some employees have recently refused to sign the written statements concerning reprimands and/or disciplinary actions. It is a requirement that the employee sign these statements ''acknowledging'' he read the statement. Note, that as always, the employee may write any qualifications he so desires but he must acknowledge by signature that he read the statement. Any employee refusing to sign the statement thereby acknowledging he read the statement is to be discharged for insubordination.

The evidence which is discussed below, shows that Richard Harris was an employee that had recently refused to sign a written reprimand. Harris was presented with a reprimand which he initially refused to sign on June 27. June 27 was the day before Respondent's president wrote the above letter.

There was no evidence that any employee other than Richard Harris refused to sign a written reprimand at a time proximate to the June 28 letter from President Jerry Mitchell.

On July 5, 1989, Robert Maines wrote his supervisors at Jackson, Mississippi:

> It has come to my attention recently, that some employees have refused to sign written statements concerning reprimands and/or disciplinary actions. It is a requirement that the employee sign the statement ''acknowledging'' he read the statement. Note, that as always, the employee may write any qualifications he so desires, but he must acknowledge by signature that he read the statement.
>
> The employee must be told and made to understand that failure to sign the statement is a dischargeable offense, insubordination. Any employee refusing to sign the statement, thereby acknowledging he read the statement is to be discharged for insubordination.

Supervisor of Field Facilities Bunyard testified that Respondent's policy regarding employees signing written reprimands has remained unchanged throughout the 3 plus years he has worked for Respondent. However, on cross-examina-

tion, Bunyard revealed that the source of his knowledge was an occasion in which he was awarded a written reprimand, some 8 months before he became supervisor. Bunyard offered no evidence that Respondent's policy was published to employees before the memos cited above.

Respondent called a former employee, Jeffrey Scott Harrison:

> Q. While you were employed at McCullough, what was McCullough's policy concerning the signing of letters of reprimand?
>
> A. I don't—they couldn't fire you for not doing it, but I think it looked bad on your record.

William Eckels testified that Respondent has had a policy of requiring employees to sign written reprimands, during the entire 10-1/2 years he has worked for Respondent.

Maintenance Mechanic Mose Bishop testified that he has refused to sign a written reprimand. According to Bishop he refused to sign a reprimand for tardiness approximately 3 years ago. His Supervisor William Eckels signed the reprimand after Bishop wrote on the reprimand that he refused to sign. Bishop testified that he did sign a reprimand he received about a year ago. On that occasion Bishop was told that he needed to sign but he was not told that anything would happen if he did not sign the reprimand. Bishop also signed a reprimand he received for not wearing gloves about 2 months before the hearing.

On cross-examination Mose Bishop was shown several reprimands on the assertion of counsel that those were all the reprimands found in Bishop's file, and Bishop admitted that he had signed all the reprimands shown. Bishop persisted in testifying that he had refused to sign one reprimand and that he had written on the reprimand that he refused to sign.

Former employee Michael Anthony Langston testified that he was present on one occasion when Mose Bishop refused to sign a warning.

Michael Anthony Langston testified that he learned of a rule that employees could be terminated for insubordination, if they refused to sign a written warning. According to Langston, he was informed of that rule after Respondent discharged the ''field crew,'' after they refused to sign. Langston testified there was no rule requiring employees to sign warnings before the field crew was discharged. As discussed below, the ''field crew'' was discharged in July 1989.

Former field maintenance supervisor, Earl Medlock, testified that he issued a written warning to Richard Harris, for failing to check a pumping station. Medlock testified that Harris refused to sign that reprimand. Medlock testified that he said to Harris:

> ''You need to sign this [warning]. And if you don't want to sign it, we need to go and talk to Bill [Eckels] about it.'' [Richard Harris] said, ''Well, I want to talk to Bill.'' And Bill more or less told him the same thing he told me about it, ''Regardless of what you were doing, you should have went by there and checked it sometime within that three-week period.''
>
> And he told me to get Richard to sign the statement. Richard said he wouldn't sign it, and I told Bill that he wouldn't—went back and told Bill [Eckels] that [Harris] wouldn't sign it. He said, ''Well, write on the reprimand that Richard Harris did not sign reprimand,'' and then for me to put my signature on it. And that's what happened.

That particular warning, which was dated April 27, 1989, was received in evidence as General Counsel's Exhibit 13. Medlock testified regarding Respondent's policy of dealing with employees who refused to sign written warnings:

> As far as I can remember, there was really no procedure other than this particular incident (the above-mentioned G.C. Exh. 13), for me, that Bill [Eckels] said it would go in [Harris'] record anyway, regardless of whether he signed it or not.

Harris was not disciplined because he refused to sign the April 27, 1989 warning.

Maintenance Electrician Willie Wilson testified that he did sign three reprimands he was awarded at times before the July 1989 election. However, according to Wilson, he was not told that anything would happen if he did not sign the reprimands. After the election, between September and November 1989, Wilson received a warning for tardiness. Wilson signed the reprimand even though, according to his testimony, he was told that he did not have to sign that reprimand.

Wilson admitted on cross-examination that it has always been his understanding that employees are supposed to sign reprimands.

Another of General Counsel's witnesses, Derrick Wells, who started working for Respondent on June 12, 1989, testified that employees were required to sign reprimands. Wells understood that Respondent considered it to be insubordination for an employee to refuse to sign a reprimand. Wells testified that he learned of the rule requiring employees to sign reprimands, during the time when Respondent was ''trying to get rid of the field maintenance people.'' Wells recalled that was the time when L. C. Spann and others were suspended. As shown below, the field crew employees were suspended and discharged in July 1989.

Lead operator Tommy Wash testified on cross-examination that on the day before the election, which was July 10, 1989, he was told by Richard Harris and L. C. Spann, that if he received a written warning, he should go ahead and sign the written warning or he would be fired.

L. C. Spann testified that he received four warnings while he worked for Respondent. According to Spann, he refused to sign the first of those warnings which he received from Maintenance Supervisor William Eckels on June 6, 1989. Spann testified that the warning was because of damage to a lawn mower. Spann was told by Eckels that the warning was going into his file regardless of the fact that Spann refused to sign the warning.

On June 29, according to Spann, he was called in by Tim Bunyard and again presented with the June 6 warning:

> Hey, I told him, hey, I wasn't going to sign it. And he said, ''Think about it.'' And I said—he says, ''Well, look here, you can go ahead and put your comments on it, but you must sign this letter or else you're going to be terminated.''

At that point Spann signed and dated the memo (6–29–89) and wrote the following comments:

> I disagree with this letter of reprimand, no warning 6–6–89 damage to company lawn mower. I have recorded dates that grass was tall & needed to be cut at Forest Ave. on many occasion. A residential type mower was purchase instead of a commercial type mower. I refuse to sign letter on 6–6–89.
>
> Again on 6–29–89 I was told that I'll be terminated if I didn't sign this letter.
>
> Without a chance to repair mower without a chance to pay for damages to mower I still disagree.

An examination of the entire record has convinced me that Respondent has continuously, from a time well before its employees' 1989 union organizing campaign, maintained a policy of requiring its employees to sign written reprimands.

However, the record also shows that Respondent did not maintain a policy of discharging employees that refused to sign written reprimands until after June 27, 1989.

On June 27 the employees' union organizing campaign was well underway. On July 11, 1989, there was an NLRB-conducted election.

On June 27, 1989, alleged discriminatee Richard Harris was given a written warning by Tim Bunyard, allegedly because Harris failed to secure a lift station door. On that occasion, when Harris initially refused to sign the warning, Bunyard told him that he would be discharged if he refused to sign the warning. Again, at a meeting with Project Manager Maines, Harris was told that he would be terminated if he refused to sign the warning. On June 28 Harris signed the warning and added the following writing:

> I don't agree with this letter because its due to union activity going on, where as a first time offense, warranted a reprimand and everyone picking on people who they think might support union, where my supervisor accused me of union activity recently.

On June 28, Respondent's president wrote all Respondent's locations, and advised that employees should be discharged if they refuse to sign written reprimands.

On June 29, L. C. Spann, another alleged discriminatee, was called in by Supervisor Tim Bunyard and told that he would be discharged if he continued to refuse to sign a June 6, 1989 reprimand.

The record shows that before the above incidents, Respondent had neither published nor enforced a policy of discharging employees for refusal to sign written reprimands. The evidence shows that before June 27, 1989, Respondent had never discharged an employee because the employee refused to sign a written reprimand. On several occasions before June 27, as shown above, employees had refused to sign written reprimands. None of those employees was discharged.

Before Respondent threatened Richard Harris with discharge on June 27, it, as shown below, had on several occasions, expressed suspicion that Richard Harris was a big union supporter.

Section 8(a)(3) of the Act, makes it unlawful for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. The record evidence shows that Respondent was motivated to change its policy to one of discharging employees for refusing to sign a written reprimand, at least in part, because suspected union pusher Richard Harris refused to sign a written reprimand.

There was no showing that Respondent had any reason other than an unlawful one, to change its policy to one of discharging employees if they refused to sign reprimands.

Unlike the situation described below involving Respondent's change in its lunch policy, there was no showing that Respondent had a legitimate business justification to change its policy regarding signing reprimands. The evidence illustrated there were few occasions on which employees refused to sign reprimands. On those few occasions, Respondent simply informed the employee that the reprimand would be entered into his personnel file with the notation that the employee refused to sign the reprimand. Respondent offered nothing to show why it was necessary to change that policy.

I find that General Counsel proved prima facie, that Respondent was motivated to change its policy regarding signing written reprimands, because of its suspicion that Richard Harris was a strong union supporter. Respondent failed to show that it would have changed its policy in the absence of union activities. Respondent's change of the reprimand policy constitutes discrimination in regard to any term or condition of employment to discourage union membership and constitutes a violation of Section 8(a)(3). (*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas, Inc*., 283 NLRB 391 (1987), enfd. 127 LRRM 3085 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987).)

C. *The Lunch and Breaktime Rule*

The complaint alleges that Respondent violated Section 8(a)(1) and (3), by promulgating and maintaining a rule requiring employees to take breaks and lunch at specific times.

The evidence regarding this allegation involved a question of whether employees were prohibited from eating lunch at a restaurant called Miss B's and whether employees could take lunch at times other than from 11 am to noon.

General Counsel offered evidence on the question of whether Respondent had a specific policy regarding employees going to a restaurant called Miss B's. Maintenance Supervisor Eckels testified that the policy regarding employees going to Miss B's for lunch was as follows:

> they could leave their work area at 11:00 o'clock, drive into the plant—you know, if they were close enough, they thought they could do it—park our truck, take their car and go wherever they wanted to go. But then they had to be back to pick the truck up and be back in their work area by 12:00 o'clock.

Supervisor of Field Facilities Tim Bunyard testified about his understanding of the policy regarding lunch at Miss B's:

> [Earl Medlock] told us that there had been a problem arose from going to Miss Bee's to eat lunch because of the fact—the time that was involved traveling from

> some of the stations up north and some of the stations in the south, the time it took to get to Miss Bee's, pick up lunch and then get back to your assigned stations.
>
> . . . .
>
> He forbid us to go to Miss Bee's while we were working, other than working at West Rankin pumping facility, which is located 2-1/2, three miles from Miss Bee's.
>
> . . . .
>
> Q. was there a policy by which the employees, if they really wanted to go to Miss Bee's and had enough time, could bring the truck back to the plant and use their own vehicle?
>
> . . . .
>
> A. When you wanted to eat lunch at Miss Bee's or any other place other than was designated by Earl or as by—instructed by Bill [Eckels] and Earl, then you had to bring your truck in, leave it at the plant, get in your own personal vehicle and go take lunch and be back by 12:00.
>
> Q. Now, in fact did this practice of employees doing this last very long?
>
> A. No. It did not. . . . I think it was because of economic reasons; they didn't want to use their gas going to pick up lunch.

However, Bunyard admitted that he and others in the field crew, ate at Miss B's on numerous occasions while he was a member of the field crew. In November 1988, Bunyard transferred out of the field crew. He admitted that from that time until he became supervisor on June 5, 1989, he was not aware of how Respondent dealt with employees eating lunch at Miss B's.

As shown above, the employee witnesses testified that Miss B's was not off limits even though, as shown below, employees were told not to drive there from distant points on their routes. Richard Harris testified that he ate at Miss B's three or four times a week.

It is clear from the above that at best, there was confusion regarding the policy of having lunch at Miss B's. The two supervisors with direct supervision over Harris, Collins, and Spann, gave different versions of that policy. William Eckels understood the policy to be one which Bunyard recalled was abandoned before he transferred out of the field crew in November 1988. Bunyard, on the other hand, admitted that he was unaware of the actual practice from November 1988, when he transferred out of the field crew, until June 5, 1989, when he became supervisor. Despite his admitted lack of knowledge, Bunyard did testify that among other things, Miss B's was off limits to the field crew on July 11, 1989. However, Bunyard's testimony was compromised by uncontested evidence, that, on July 20, 1989, while working at the West Rankin station, Bunyard told L. C. Spann that Spann could eat at Miss B's.

What is clear is that employees were admonished not to drive to Miss B's for lunch, from distant field stations. Although employees were never given rigid guidelines, they were cautioned to exercise common sense in leaving their work route to drive to Miss B's. The record shows that Respondent was aware that employees patronized Miss B's because of that restaurant's practice of permitting customers to charge their meals.

There was evidence that before the election on July 11, 1989, Respondent permitted employees to take their break or lunch at times other than the established times. For example, Michael Anthony Langston, who was a utility man until September 1989, testified:

> we've always taken—you know, like, we used to go out into the field and work, and we could work through our morning breaks and lunch breaks and the evening break and get off early, so it was just—as long as you would let the supervisor know, it was all right, ahead of time.

However, according to Langston, about 2 weeks after the election, he and Mose Bishop, were told by William Eckels that they were to take their breaks at the appointed times or not at all. Langston testified that Eckels told them that the Union does not allow it.

Richard Harris testified:

> we often proceeded to 11:00 doing maintenance work to where we even took lunches as late as 1 or 2:00 because we had breakdowns in the field. And that's what we was up against in the field. It wasn't no at 11:00 stop what you're doing and take a break; at 9:00 stop what you're doing and take a break; you couldn't do that.

Earl Medlock, the former supervisor for the field facilities, testified:

> if we were going to be involved in something that was going to take more than an hour to do we would either start our lunch early or start our lunch late. My crew was given instructions by me to let me know in case they needed to start breaks early or start lunch early or start lunch late if it was going to take more than an hour to do a particular job.
>
> . . . .
>
> And Bill [Eckels] told me, he said, ''Well, you better make sure you know when they do this.'' I had the guys tell me, call me on the radio and try to get in touch with me or Bill whenever they wanted to take an extended lunch, at least to take a lunch break that was over the amount of time, past the original scheduled time or before the original scheduled time. The same with breaks.
>
> Whenever they could get in touch with me or Bill they would, but sometimes they couldn't get in touch with either of us, and they just went ahead and did what they saw fit and then logged it down as to what they did as far as their schedules went.
>
> [Robert Bunyard] went to lunch with the other fellows. There was an eatery, a lady that served plate lunches not far from one of the pumping stations in the center of town.
>
> That was Miss B's.
>
> . . . .
>
> I would say on the average [the crew that sometime included Robert Bunyard before he became supervisor] ate [at Miss B's] at least three times a week.
>
> [The crew was] told to stay there at their jobs and either eat somewhere in the area, because a lot of times

> we were working maybe fifteen miles from the place where they usually eat at lunch time, and it was—a lot of times it was set up from them to start—for all of them to meet up there at the west Rankin pumping facility to work there at that particular pumping station because there at that station it was a pretty dangerous atmosphere and all of them had to—three people usually be there together to work there due to the gases involved, the moving machinery . . . and usually they'll meet there before and start cleaning, stop, go to Miss B's and come back and eat.
>
> . . . .
>
> As far as policy goes, there wasn't a mileage limit. Bill Eckels had stated that if those guys are working out north or working so far out south that they were so—if they were just so far away from Miss B's, no mileage given, if they're working way out there they shouldn't have to come in here. It's just not good for them to come way back to town just to get something to eat and go back out there; they're wasting time and money and gas.
>
> . . . .
>
> The parks, Battlefield Park (was the only area that was off limits).

L. C. Spann testified about Respondent's lunch policy:

> If I ran into a pumping station that had lost prime or that had been tripped and the wet well was high and it was near lunch time, I wouldn't take a lunch break, I mean, maybe till 1:00. I mean, it wouldn't be no big issue about it, and I never had to explain to anyone. I might mention to Eckels or to Bunyard or Medlock in the past that, hey, look, when I got to Brookhollow, for instance, that's a station that goes out a lot, both pumps were hot, and I had to prime them, and I didn't get to lunch until maybe about 2:00. You know, I never had any problems.
>
> And I have also taken lunch early, as much as thirty minutes early, as much as an hour early. I never had any problem. And Eckels and I had talked a couple of times about that. He said, ''Yeah, I kind of know it's hard to take breaks on time because of so much traveling time involved.''

Spann testified that he had eaten lunch at Miss B's around 3 times a week for the last 1-1/2 to 2 years that he worked for Respondent. He testified that Mose Bishop, Tim Bunyard, Medlock, Richard Harris, Willie Jackson, Willie Wilson, and Lonnie Collins used to eat at Miss B's and that Bishop would pick up a plate for William Eckels.

On one occasion, according to Spann, Eckels and Medlock told him not to come off his north route and go to Miss B's for lunch. Spann testified that his north route took him as far away as 15 miles. However, Spann testified that Respondent never did decide on a firm plan regarding how far employees could go for lunch until after he was suspended on July 25, 1989. When Spann returned on July 28, he was asked to initial the following memo to all lift station employees, from Robert Bunyard:

> There seems to be some confusion of where we can or can not take our lunch break. Lunch Break is to be taken with in your scheduled route. It seems to me common sense would be enough direction but it appears thats not the case. I might suggest that lunch be brought from home to avoid any conflict on this matter in the future. If not then a standard of 2 miles each way will be acceptable from the station in which you are working. If any questions contact me to clear up this matter.

William Eckels testified that the lunch and break policy did not change during the 1989 union campaign and that the same policy existed from a time before he issued a memo on December 1, 1988, concerning the lunch and break policy. That memo included the following:

> B. Personnel are to remain in their designated work areas unless their presence is requested elsewhere by either the maintenance supervisor or during an emergency.
>
> C. The designated times will be adhered to. Lunch hour and breaks will be taken and will not be worked through without prior authorization or if an emergency exists.

Supervisor of Field Facilities Tim Bunyard testified that field crew employees could take a later lunch break if it was necessary to work through 11. However, according to Bunyard, it was necessary for the employee to radio his supervisor before changing his lunchtime.

Bunyard testified that the field crew did not abide by company policies before he became supervisor. Bunyard was asked how Richard Harris and L. C. Spann violated company policy:

> Well, they would—there was numerous times that we would extend our lunch breaks; I say, We: I was part of it, too, for a while. And we would play basketball. They would pitch quarters, shoot dice, things of that nature.

According to Bunyard, he set out to correct the abuse of company policies by the field crew when he became supervisor on June 5, 1989.

The record, including admissions by Supervisor Bunyard, shows that the field crew employees regularly abused the break and lunchtimes before Bunyard became supervisor. Bunyard admittedly took steps to stop those abuses when he became supervisor on June 5.

As noted in other portions of this decision, the evidence illustrated that Supervisor Tim Bunyard was motivated to take action regarding his field crew because of their known and suspected union activities. On July 11 Bunyard expanded Respondent's policy regarding lunchbreaks including specifically lunch break at Miss B's, due, in part, to animus against the suspected union activities of its field crew employees.

However, unlike the situation involving the rule requiring employees to sign written reprimands, there is evidence showing that Respondent would have acted to change its lunch practices regardless of its employees union activities.

Here, the evidence illustrates that Respondent had cause to be concerned about abuse of lunch and break periods. The employees routinely took lunch and breaks before or after

specified times and the employees frequently took more than the allotted time for lunch.

General Counsel argued that the evidence shows that Respondent took action to crack down of break and lunch period violations because of its employees' union activities.

General Counsel is correct. However, the record illustrated more grounds for the change in lunchbreak policies than its employees' union activities.

Tim Bunyard became supervisor of the field crew on June 5, 1989. Although Bunyard's subsequent actions clearly demonstrated his union animus, those actions also demonstrated a desire to shape up operations because of poor work practices. The evidence is uncontested that the field crew was abusing their lunch periods by frequently driving long distances to lunch, by frequently overstaying their lunch period and by taking lunch at other than specified times without advising their supervisor.

Although I am convinced that the evidence shows that employees were permitted to take early or late lunch, if, in the employees opinion, their work justified changing the time for lunch, the evidence also shows, that Respondent had a longstanding policy of requiring employees to advise their supervisor before taking either early or late, lunch.

I find that the evidence did prove that Respondent changed its lunchbreak policy on or before July 11, 1989. There were several motivating factors behind Respondent's change in its lunch policy including its employees' union activities. However, as shown above, I am convinced that Respondent would have changed its lunch policy in the absence of its employees' union activities. I find that Respondent did not violate Section 8(a)(3) of the Act regarding the lunchbreak policy. (*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas, Inc*., 283 NLRB 391 (1987), enfd. 127 LRRM 3085 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987).)

D. *Bernard Bennett*

The complaint alleged that Respondent illegally reprimanded Bernard Bennett on July 10, 1989.

On July 10, 1989, Project Manager Robert Maines issued the following written warning to Lead Operator Bernard Bennett:

> The following was reported to me on this date, at 7:15 A.M.:
>
> At 7:05 A.M., you approached Utilityman, Ken Thomas and solicited his support for the Teamsters Union. This occurred during normal working hours for both yourself and Mr. Thomas. You were not only negligent toward your own duties, but you also obstructed Mr. Thomas in the performance of his duties. As the person in charge of your shift, you are looked upon and expected to set an example for other employees in the performance of your work. You have been negligent toward your work responsibilities by taking the time to wait around for an opportunity to solicit this individual; whereas, you were supposed to be monitoring the facility and performance of those workers under your direct supervision. This will not be tolerated in the future. You are instructed to cease conversation with personnel other than in the performance of your job. As well, you should be informed, soliciting is not allowed on the premises of the work project.
>
> This is a written reprimand, which will placed in your personnel file.

Bennett testified that on the occasion questioned in the above warning, he called over Ken Thomas and asked Thomas if he was ready. Thomas responded yes. Bennett admitted that he was referring to the Union when he asked Thomas if he was ready. Bennett testified that his conversation with Thomas occurred during working time. Bennett said that he had talked with Thomas, about the Union, a few days before July 10.

Project Manager Robert Maines testified:

> [Bennett] approached an employee who was on his work schedule—in other words, he was on the clock at the time—and started trying to sell the union upon him.
>
> The employee told him he didn't want to hear about it and then reported it to his supervisor after about five minutes of his time had been taken up, which if the supervisor had caught him, he would have caught it. And then the supervisor reported it to me.

According to Maines, the employee that complained about Bennett's solicitation, Kenneth Thomas, left Respondent's employ several months ago. Respondent is unaware of Thomas' whereabouts. On motion by Respondent, I received Kenneth Thomas' affidavit in evidence. However, there was nothing in that affidavit regarding Thomas' conversation with Bernard Bennett.

Bennett went on to say Respondent did not have a no-solicitation rule or a no-talking rule, in effect before July 10. Bennett testified that he had engaged in solicitation before that date and he had observed supervisors engage in solicitation. According to Bennett, it was commonplace for employees to talk to each other while working. Bennett testified that he oftentimes talked with others including Supervisors Jackie Kiser and Andrew Hawthorne, during work about nonwork related subjects.

The reprimand issued to Bernard Bennett, because of his union activity in talking to a fellow employee about the Union, was, according to General Counsel's argument, violative of Section 8(a)(1) and (3).

Respondent argued that at the time of the above reprimand, it considered Bennett to be a supervisor. The record showed that Bennett was a lead operator. Bennett could direct the work of one other employee, William Tillman. At the time of the incident involved in his reprimand, Bennett was the highest ranking employee at Respondent's facility during the midnight to 8 a.m. shift.

The record showed that Bennett was 1 of 22 employees that were reputed as having voted for the Union. He was present at the press conference following the election. Despite the testimony that Bennett was the highest ranking employee from midnight to 8 a.m., there was no evidence to show that he exercised any supervisory authority during that shift. Bennett worked as an operator and he directed the work of his more junior coworker, William Tillman. On the

basis of that evidence I find that Bennett was not a supervisor at material times.

General Counsel argued that the above evidence proved a violation of the Act by Respondent's actions in enforcing an illegal no-solicitation and no-talking policy against its employees' union activities. *299 Lincoln Street, Inc*., 292 NLRB 172 (1988), and *Cannon Industries*, 291 NLRB 632 (1988).

I find that Respondent did not have valid no-talking or no-solicitation rules in place before July 10, 1989. The only instance of Respondent applying such a rule was the occasion of Respondent reprimanding Bennett on July 10. July 10 was the day before the Board-conducted election.

I find that Bernard Bennett was discriminatorily reprimanded because of his union activities and because of an illegal no-solicitation, no-talking rule. Respondent violated Section 8(a)(1) and (3) by disciplining Bennett.

E. *Collins, Harris, and Spann*

It is alleged that Respondent violated the Act by discharging four employees. Three of those alleged dischargees, Lonnie Collins, Richard Harris, and L. C. Spann, made up Respondent's entire field crew at the time of their discharge.

Respondent's field crew of Collins, Harris, and Spann, was responsible for the checking, cleanup and minor repair of some 84 pumping stations in the Jackson, Mississippi area. Their job did not involve major repairs but it was their duty to report on anything requiring major repair.

There was evidence that Respondent complimented the field crew on occasion before the July 11 election. L. C. Spann testified:

> we was getting comments from Bob Maines, even Eckels, saying that, for the manpower we had, we was doing a good job. We had meetings and say to the field crew everything is looking better, upward, and—because—hey, Maines probably could tell you when we first took over, they probably have pictures, the field was a mess, and, hey, we was getting praise.

From before the time of the election, up until their discharges, the field crew supervisor was Robert Tim Bunyard.

There were some issues which were common to Collins, Harris, and Spann.

Many of the common issues involve events on July 11, 1989. All three members of the field crew, were seen by Respondent at a restaurant known as Miss B's. According to Respondent, the three employees were not authorized to be at that restaurant on July 11. Moreover, all three, who were all at Miss B's to pick up their lunch, were seen at the restaurant before their specified lunchbreak from 11 a.m. to noon.

Respondent contended that all three employees were out of their work areas when they were seen at Miss B's. Respondent's evidence included testimony of Project Manager (Plant Manager) Maines.

Robert Maines testified that Lonnie Collins and L. C. Spann, who were working together on July 11, 1989, were using one of Respondent's trucks, as was Richard Harris. Harris was working the south route along Siwell Road. According to Maines, Harris was working over 10 miles from Miss B's restaurant and it would require some 15 to 20 minutes from him to drive from the stations where he was assigned to work on the morning of July 11, to Miss B's restaurant. Maines estimated that Collins and Spann were working approximately 10 miles from Miss B's and, they too, would need 15 to 20 minutes to drive from their work area to Miss B's.

An examination of the Jackson city map, which was introduced into evidence by Respondent, shows that Harris' work area was along the 8-mile circle. That circle denoted a radius of 8 miles from the center of downtown Jackson. Miss B's restaurant, which is almost directly south of the downtown center designated on the map, is located between the 1-mile circle and the 2-mile circle. While Harris' work area is not on a direct line connecting the downtown center with Miss B's, it was in the same general direction. Harris' work area is southwest of downtown center. The difference between the Miss B's location, approximately 1-1/2 miles from the downtown center, and Harris' work area location, approximately 8 miles from downtown center, would be in excess of 6-1/2 miles direct. Obviously, travel by streets would require a longer drive than the air miles between the two locations.

A computation of the distance from Miss B's to the work area of Collins and Spann, would be less precise because their work area was due west of the downtown center. Collins and Spann were working short of the map line designating 6 miles from downtown center; what appears to be approximately 5-1/2 miles from downtown center. By looking at the map, it appears the direct distance from their area to Miss B's restaurant, would be slightly less that the distance from their work area to the downtown center; perhaps, a little less than 5 miles. Again, the driving distance would be greater.

The McDowell Exxon station appears to be some 3 miles from downtown center, perhaps 4 to 4-1/2 miles from Collins' and Spann's work area and, approximately 1-1/2 miles from Miss B's. Again, those would be direct distances. Driving distances would be greater.

Livingston Street, which was identified by Lonnie Collins, as being where he and L. C. Spann actually ate their lunch after leaving Miss B's, is something slightly over 1 mile north of the downtown center.

Robert Maines testified that Lonnie Collins and L. C. Spann were using Respondent's truck number 3, on July 11, and they had been using that same truck for at least 3 months before July 11. Maines agreed that the gas gauge on truck number 3 was broken. Due to the gauge being broken, Collins and Spann were, according to Maines, required to fill up the truck each morning as they started out on their route.

As to the events during lunch on July 11, there does not appear to be a serious dispute regarding the question of time. Harris, Collins, and Spann all appeared at Miss B's well before the designated 11 lunch breaktime. However, there is a serious dispute regarding Respondent's policy regarding its tolerance of extending the lunchbreak before 11 a.m. and its tolerance of permitting its employees to leave their work areas.

F. *Richard Harris*

Richard Harris' termination form included the following explanation:

> Job negligence, failure to follow directive (insubordinate), unauthorized use of Lift sta. vehicle.

When asked to identify the job negligence and insubordination involved in Harris' termination, Project Manager Robert Maines testified:

> He left a lift station unsecured, wide open to the public, what we call freelancing as far as his lunch breaks.
>
> . . . .
>
> I—one of which I know is lift station vehicle usage as well as, particularly, now, the lunch break directive.

Robert Maines identified two disciplinary actions which contributed to the discharge of Harris. On July 3, 1989, Harris was suspended for 2 days after a determination that Harris was at fault in a lift station being left unsecured on June 22, 1989. Maines testified that was a major offense, due to the possibility of injury or death to someone, especially a child, if they got into a lift station.

Again, on July 11, 1989, Harris was suspended. When Supervisor Bunyard recommended Harris' termination by memo dated July 12, he discussed the incident which led to the July 11 suspension:

> On July 11, 1989, Mr. Harris was placed on 1 /2 day suspension pending review of his personnel file. The reason behind the suspension was leaving his designated route in a company vehicle to buy lunch at a place designated as off limits due to the amount of time and travel involved. Mr. Harris also took lunch 35 minutes longer than Maintenance personnel normally takes. Mr. Harris was aware that the company vehicle was not to be used in this manner but ignored the policy altogether. Mr. Harris was also placed on 2 day suspension on July 5th and 6th for violating safety procedures at Forest Park lift station on June 21, 1989. Mr. Harris attitude and his job performance have been less than desirable. My recommendation at this point is termination.

Despite Bunyard's July 12 memo which gives the impression that termination was still being considered, the evidence is uncontested that Respondent's observer at the July 1 NLRB election challenged Richard Harris' vote on the grounds that Harris had been discharged at 12 noon on July 11.

Robert Maines, in testimony regarding his reasons for discharging Harris, testified:

> [Harris] did—he became anti-establishment, it appeared. He could not follow the policies. He was just being insubordinate towards policies.

On July 11, 1989, Supervisor Tim Bunyard wrote the following memo:

> On July 11, 1989, Richard Harris was seen off his route going to lunch at 10:35 AM. Richard has been told that Ms. B's was off limits for lunch due to the amount of time it takes to get to and from that area. Only time lunch can be bought there is when working at West Rankin Pumping Station. Lunch hour starts at 11:00 AM and ends at 12:00 PM with no exceptions unless otherwise discussed with me. Lunch hour is to be taken within the designated route only with no exceptions. This is a letter of reprimand that will enter your personal file along with the rest of today and tomorrows work shift being suspended. You are place on disciplinary leave for the remaining of your work shift today and also for the work shift on July 12, 1989. You will report back to work on July 13, 1989 at 7:00 AM.

Richard Harris does not dispute Respondent's assertion that he went to lunch before the 11 lunch period, on July 11. What Harris does contend is that he did not violate established practice by going to lunch early on July 11.

Harris testified that he was making his normal rounds of the south lift stations on the morning of July 11, when he discovered that key 253, Ramada Circle, was missing from the key ring he had been given that morning by Supervisor Robert Tim Bunyard. He radioed Bunyard, drove over to where Bunyard was working in the McClure area, and picked up key 253. However, later that morning, after Harris finished his work at Ramada Circle, Harris discovered that the keys for the next several stations on his route, were also missing from the ring he had been given by Bunyard. Harris again radioed Bunyard, who by that time had left the McClure area. On that occasion Bunyard told Harris that he would get the keys to Harris, but that it would be after lunch before he could do that. According to Harris, at that time he was out of work until Bunyard brought the keys.

Harris testified that his personal keys had been confiscated by Tim Bunyard. Bunyard told him that Project Manager Maines needed Harris' keys so that Maines could check the stations.

It was 10:15 a.m., when Bunyard told Harris he would meet him at the plant and give him the keys after lunch. Harris was temporarily out of work due to his not having the necessary keys. Harris drove over to Miss B's for lunch, arriving at Miss B's around 10:35 or 10:40 a.m.

Supervisor Tim Bunyard denied that he had any radio conversations on the morning of July 11 with Harris regarding keys. Bunyard testified that he confiscated Harris' keys after Harris was discharged and that only one key, the key to McClure Station Number 4, was missing from that key ring.

Robert Maines testified that an examination of Harris' log for July 11, illustrated to him that Harris had plenty of work to keep him busy until his regular lunchtime regardless of whether he had keys for some of the stations as Harris claimed in his testimony. Moreover, according to Maines, Harris' July 11 log, shows that Harris did in fact, check some of the stations which he contended he was unable to check because he did not have keys.

Harris admitted that he was in violation of the rule William Eckels has laid out regarding when the employees could drive to Miss B's.

After getting his lunch Harris was radioed by Bunyard and told to meet Bunyard at the plant at noon. Harris ate lunch in a park in front of the plant. Harris then went to Bunyard's office. Bunyard was there with Supervisor Jackie Kiser:

> [Bunyard] proceeded to sit down and tell me, he said, ''I followed you to Miss B's. Did you know it was off limits?'' And it's never been off limits that I know of because Eckels straightened that up earlier as to where we could eat. And they told us if we was off up north or down south not to come all the way fifteen,

> fourteen or fifteen miles just to eat at Miss B's, and if I was down south not to come all the way back from down south to eat, but if I was right in the vicinity it was okay to eat there. It never was a case of where it was off limits.
>
> . . . .
>
> He told me I would be suspended because of that. And that was July the 11th. And he proceeded to tell me that he didn't know how it would effect me voting that same afternoon. He said he would call Maines, but I don't know whether he called him or not, and I left shortly afterwards.
>
> . . . .
>
> He told me to come back on the 13th, July 13th, but that same of the 11th I came back to vote, and my vote was challenged, and the company observer, Don Dixon, told me I couldn't vote because I had been terminated as of 12:00 of July the 11th.
>
> . . . .
>
> [On July 13] I went to the administration office, and when I got there, it was Maines, Eckels, Kiser and Bunyard was already in the office. And he called me in and told me to be seated, and he proceeded to say it wouldn't take long, what he had to do.
>
> . . . .
>
> [Maines] told me it wouldn't take long. He said I would be terminated as of that day.
>
> I told [Maines] that I didn't think it was right; I was lured out in the area to where I didn't have nothing to work with, no keys or nothing, and it wasn't fair.

The record includes evidence showing both that Richard Harris was active in the 1989 union campaign and that Respondent knew or suspected that Harris was deeply involved with the Union.

Harris testified that he signed a union authorization card, attended three or four union meetings, and ''got somebody to sign a union card.''

Additionally, there was evidence that Respondent suspected that Harris was one of the leading employee organizers for the Union.

Harris testified about a conversation he had with Tim Bunyard before Bunyard became a supervisor, around April 1989, while at work:

> [Bunyard] came to me and he told me, ''Hey, I know you was the organizer of this union they're trying to get.'' And I told him, ''Maybe so.'' He told me I worked at G.E., and I was part of a union at G.E.

Harris recalled a conversation with Bunyard about 2 weeks after Bunyard became supervisor, in Bunyard's office. Lonnie Collins and L. C. Spann were also present:

> And [Bunyard] went through the same, telling me that I was an organizer because I worker for General Electric.

A former employee of Respondent, Michael Anthony Langston Sr. testified that he overheard the following conversation while at work in the shop near the water fountain, between Bill Eckels and Tim Bunyard about 1 week after the Union filed its representation petition:

> Tim Bunyard replied to Bill Eckels, saying that he believed that Richard [Harris] was the organizer, and Eckels replied to him, saying he felt like—he said he didn't know because it may have been Mose because Mose attempted to start these meetings earlier.

On cross-examination, Langston admitted that he was not certain that the above conversation occurred after Bunyard became a supervisor. As shown above, the parties stipulated that Bunyard was a supervisor from 12 p.m. on June 5, 1989. Respondent admitted that Bill Eckels was a supervisor at all material times.

Langston also admitted during cross-examination, that he did not hear the word union mentioned during the conversation between Bunyard and Eckels.

The former field maintenance supervisor, Earl Medlock, testified that after an employee meeting in which Respondent's president, Jerry Mitchell, spoke to employees on April 4, 1989, he was called into William Eckels' office. Among other things the conversation between Eckels and Medlock included Eckels commenting:

> There are some people in maintenance, and you know them, that are pro-union.'' And I told Bill, ''Well, I don't know anybody,'' because I didn't know anything about the letter or the people hadn't been saying anything. He said, ''You know them. One of them is Richard Harris.''
>
> And he went on to say, ''Richard, he came from G.E., and G.E.'s a union plant, and I imagine he's heavily involved in the union. And Richard and L. C. are real close friends, and I imagine L. C.'s involved, too. Lonnie Collins, he could go either way, but by him being L. C.'s cohorts, or they're buddies and they hang out together, I imagine Lonnie's involved in the union also.''
>
> Bill Eckels went on to say that Richard Harris worked at G.E. for almost twenty years, and if a man worked inside a union for twenty years, then he has union in his blood, and he guaranteed it.
>
> He said that ''Richard's come to work after lunch on several occasions with alcohol on his breath, and if he don't stop he's going to mess up and lose his job. He's going to be terminated. I don't have to set no trap for him; all I have to do is wait for him to mess up, because eventually he's going to mess up one way or the other.''
>
> And [Eckels] talked about another fellow that worked there at the administration building that was more or less a janitor.
>
> . . . .
>
> Well, he said he was very rebellious and that he was against everything that McCullough was standing for and that if anybody had anything to do with the union he would be one of them. And he was planning on keeping his eye on Richard Harris and this fellow. For the life of me, I just can't think of his name right now.
>
> Yeah, it was Brian King, that's who it was.

Eckels admitted that he and Medlock speculated that Richard Harris may have been involved with the Union. Eckels went on:

> Well, Mose Bishop told me that we knew—Mose Bishop's preacher used to be the shop steward down there at General Electric, and he knew Richard Harris. So when Richard Harris was hired, Mose Bishop knew about him already, and that he was a union member, and that he—you know, he was a strong union man.

Earl Medlock testified that he issued a written warning to Richard Harris because Harris failed to check a pump station which had gone out over a weekend and caused flooding of a home. Medlock resisted warning Harris because Bill Eckels had told him that the crew did not need to check the new pumps often because those pumps were still under warranty. Despite Medlock's protest, Eckels insisted that Harris be reprimanded on threat that failure to discipline Harris could result in the discharge of Medlock. The warning, General Counsel's Exhibit 13, was dated April 27, 1989, and, as shown above, Harris refused to sign the warning.

Harris corroborated Medlock's testimony regarding the warning he received on April 27, 1989. As shown above, the comments on the bottom of the written warning support Harris' and Medlock's testimony that Harris refused to sign the warning.

As mentioned above, on June 27, 1989, Harris was given a written warning by Tim Bunyard, allegedly because Harris failed to secure a lift station door. On that occasion, when Harris initially refused to sign the warning, Bunyard told him that he would be discharged if he refused to sign the warning. Again, at a meeting with Project Manager Bob Maines, Harris was told that he would be terminated if he refused to sign the warning. Harris signed the warning and added the following writing:

> I don't agree with this letter because its due to union activity going on, where as a first time offense, warranted a reprimand and everyone picking on people who they think might support union, where my supervisor accused me of union activity recently.

That written warning also contains a note signed by Tim Bunyard, ''Refused to sign 6–28–89.''

L. C. Spann testified that he had several conversations with Field Supervisor Tim Bunyard about the Union. Spann testified that the second of those conversations occurred about 3 weeks before the election in Bunyard's office:

> [Bunyard] told me that he didn't know if I had anything to do with the union or not, but he was aware that Richard Harris was employed at G.E., and they had a big union over there, and he believed that Richard Harris was probably the man.

Former employee Derrick Wells testified about one of several conversations he had with Maintenance Supervisor Bill Eckels at work on July 8, 1989:

> [Eckels] told me—he asked me did Richard Harris talk to me about the union that day I was out there. I told him I was trying to stay out of it. He told me I'd go out in the field one day and they'd change me over.

Lonnie Collins testified that he overheard a conversation involving Tim Bunyard and Richard Harris, before the election but after Bunyard became supervisor, at the Ramada Circle pump station, and that Bunyard asked Harris if he was a big man, a union man at G.E. Collins recalled that Harris did not respond to Bunyard's question.

There was also some evidence which tended to show that Respondent decided to get rid of Harris because of its belief that Harris was one of the primary union pushers.

As shown below, according to Lonnie Collins' testimony, he and his work partner on that day, L. C. Spann, were called into the plant after lunch on July 11, where he met with Supervisors Bunyard and Kiser. His testimony, which is quoted below, included the following:

> Well, he had said that L. C. had got a warning letter and Richard [Harris] had got one for going to lunch early. He had told me that they had been following Richard all day long, and they seen that he went to lunch thirty minutes early or something, and he had told me if they got a warning letter I had to get one, too.

L. C. Spann was also suspended on July 11. As Spann was at the truck before leaving, Tim Bunyard came over and talked with him. That conversation included the following:

> Bunyard came over and tried to talk to me. And he touched me, and I told him not to touch me. I told him to get his hands off me because ever since he'd been supervisor he'd been causing problems for me, and he said—and I didn't want it. He said, ''Look here, let me talk to you a minute.'' He said, ''You and Collins got caught up in the wrong thing at the wrong time. This wasn't for you all.''
>
> But, hey, he said something about Bob Maines had followed Richard Harris to Miss B's, and he had saw me at the Exxon, and he had got a call from Maines going to Miss B's where he knew that I was at the Exxon. And I showed him the ticket and everything, and he said, hey, we just got caught up at the wrong place, wrong time.

Maintenance Supervisor William Eckels admitted that until July 11, 1989, no member of a lift crew had ever been disciplined for abuse of lunch break. Eckels testified that he was aware before July 11, 1989, that Miss B's was a popular spot for lift station operators to take their lunch breaks.

William Eckels testified that he and the then Field Supervisor Earl Medlock, speculated that Spann and Lonnie Collins might be for the Union in view of the fact that they worked with Richard Harris.

Eckels admitted that he and Medlock speculated that Harris was pushing the Union.

In consideration of the allegations regarding Richard Harris' discharge, I do not credit the testimony of Tim Bunyard. As shown above, I find that his testimony is unreliable. I do credit the testimony of William Eckels. Due to evidence that Earl Medlock pleaded guilty to embezzlement, I shall discredit his testimony to the extent that it conflicts with credited testimony. However, in that regard, I find that Medlock's testimony was frequently corroborated by credited testimony including, in many instances, the testimony of Maintenance Supervisor William Eckels.

As to the merits of the allegations regarding Richard Harris, I am convinced that Harris was discharged because Respondent suspected that he was a strong union advocate. The evidence which I find convincing includes testimony including admissions, that Respondent's supervisors made several comments to employees about Respondent's belief that Harris was a strong union man; the timing of Harris' discharge (i.e., on the day of the NLRB election); and the evidence showing disparity in Respondent's treatment of Harris.

The evidence showed that Harris was actually discharged on July 11. In that regard I credit the following testimony of Harris which was not contested:

> He [Bunyard] told me I would be suspended because that. And that was July the 11th. An he proceeded to tell me that he didn't know how it would effect me voting that same afternoon. He said he would call Maines, but I don't know whether he called him or not, and I left shortly afterwards.
>
> . . . .
>
> He told me to come back on the 13th, July 13th, but that same of the 11th I came back to vote, and my vote was challenged, and the company observer, Don Dixon, told me I couldn't vote because I had been terminated as of 12:00 of July the 11th.

Respondent did not dispute that its election observer told Harris that he had been discharged effective at noon on July 11, 1989.

Although the evidence was considerable that employees routinely abused their lunch and break privileges, the evidence also showed that until July 11, no one had been disciplined because of that abuse. In that regard William Eckels admitted that until July 11 no employee had been discharged because of abuse of a lunchbreak.

On July 11 Richard Harris left his route and drove several miles to buy lunch at Miss B's. He was off his route long before his designated lunch hour and he did not advise his supervisor that he was breaking early. Although the evidence is disputed as to why Harris left his route early and drove to Miss B's, I find that Harris did in fact, disobey Respondent's policy regarding lunchbreaks.

Respondent, in its brief, pointed to what it considered an unbelievable story as to why Harris had deviated from his route and drove to Miss B's on July 11. However, Respondent also expressed disbelief in the stories of Lonnie Collins and L. C. Spann as to why they drove to Miss B's for lunch on July 11. As shown below, I find disparity in the treatment of Harris in part because of the similarity in the incidents involving Harris, Collins, and Spann on July 11. Although the events were similar, Respondent's punishments were not similar. However, I do not base my finding on a determination that Harris, Spann, and Collins were truthful in their explanations of why they were justified in going to Miss B's on July 11. All three employees did, in my opinion, abuse their lunch privileges.

There is no question but that the above facts would normally provide more than adequate grounds for an employer to discharge an employee. I find that this was not a normal situation in view of several factors.

It was not Respondent's practice to discharge employees because they abused its lunchbreak policy. Tim Bunyard testified that the field crew frequently abused that privilege when he was on the crew until November 1988.

Moreover, Respondent did not discharge employees after July 11 because of abuse of lunch privileges. In fact contemporaneously with Harris' actions on July 11, two other alleged discriminatees, Lonnie Collins and L. C. Spann, engaged in precisely the same action. As shown below, both Collins and Spann, left their routes well before 11 a.m., drove to Miss B's to buy lunch where they were seen by Supervisor Bunyard, and those two employees did not return to their work until the end of their regular lunch period. As shown below, L. C. Spann was reprimanded a second time on July 26, 1989, for abuse of lunch privileges. Nevertheless, those two lunchbreak infractions did not contribute toward Spann's discharge.

In view of the above evidence, it is impossible to distinguish the magnitude of the improper conduct by Spann and Collins from the conduct of Harris. Nevertheless, Respondent treated the three differently. Spann and Collins were suspended and reprimanded. Richard Harris was discharged.

Of the three, Richard Harris was suspected as being the most ardent union pusher. In fact, the evidence shows that Spann and Collins were occasionally linked with the Union by Respondent, because of their association with Richard Harris.

The record evidence does not show any other reason why Harris was the only employee that was ever discharged because he abused his lunch privilege. In making that determination I am aware that Respondent referred to Harris' June 27 reprimand, as an additional basis for his discharge.

The record evidence illustrated that the June 27 reprimand was not mentioned during conversations with Harris over his discharge or suspension and it was not mentioned in the July 11 memo from Bunyard showing the basis for Harris' suspension. At the July 11 election, Harris was informed by Respondent's election observer that he had been terminated at noon that day.

I am convinced from the record, that Harris was fired on July 11, 1989. I find that the sole reason given for his discharge was his July 11 abuse of his lunch hour.

Moreover, even if I should find that Respondent actually considered his June 27 reprimand as shown in testimony and in writings after July 11, the evidence shows that too would be discriminatory. Other employees, including Spann and Collins, had prior reprimands but were not discharged because of lunch privilege violations.

Finally, I find that the evidence is conclusive that Respondent suspected that Richard Harris was one of the major reasons why it was confronted with a union organizing campaign.

The record did not include evidence that Harris would have been discharged in the absence of his union activities. I find that General Counsel proved that Respondent was motivated in the discharge of Harris by its belief that Harris was a union advocate and Respondent failed to prove that Harris would have been discharged in the absence of union activities. (*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987).)

G. *Lonnie Collins and L. C. Spann*

Both Lonnie Collins and L. C. Spann were discharged after each of them refused to sign a written reprimand.

As shown above, the record shows that Respondent's employees voted in a Board-conducted election at its facility in Jackson, Mississippi, on July 11, 1989. After the election several employees met with news people regarding the Union's victory in that election. Chester Hicks, a laboratory technician for Respondent, testified that in addition to Union Agent Kenneth Paige, there were several employees at that news interview at Respondent's facility, including Lonnie Collins, James Varnado, L. C. Spann, Brian King, 11 other employees named by Hicks, and Hicks. Hicks testified that several of Respondent's supervisors saw the employees at the news conference. Lead Operator Tommy Wash, who was formerly a laboratory technician at the time of the election, and laboratory technician James Varnado, corroborated the testimony of Chester Hicks regarding the news interview after the NLRB election on July 11, 1989. Varnado recalled that employees at that news interview in the conference room at Respondent's Jackson plant, included most of the employees that supported the Union including, among others, Richard Harris, L. C. Spann, Lonnie Collins, Brian King, and himself.

Richard Harris worked alone on July 11, 1989. However, Harris, Collins, and Spann were all at Miss B's restaurant that day. Collins and Spann were working together on July 11.

The complaint alleges that Lonnie Collins and L. C. Spann were discharged in violation of Section 8(a)(1) and (3) of the Act.

Lonnie Collins was discharged on July 12, 1989, and L. C. Spann was discharged on July 28, 1989. Both Collins and Spann were allegedly discharged for refusing to sign written reprimands.

Robert Maines and William Eckels testified that both Spann and Collins, would be working today, absent future problems, if each of them had not refused to sign written reprimands.

Supervisor Tim Bunyard issued the following reprimand to Lonnie Collins:

> On July 11, 1989, Lonnie Collins was seen off his route going to lunch at 10:40 AM. Lonnie knows lunchbreak starts at 11:00 AM to 12:00 PM. Lonnie is also aware that he is not supposed to be off the designated route due to the amount of time it takes to go to and from Ms. B's to buy lunch. Lunch hour is to be taken within the designated route only, with no exception. This is a letter of reprimand that will enter your personal file along with the rest of today's shift being suspended.

At the bottom of the memo was the following note:

> Lonnie refused to sign letter stating Ken Paige instructed him that he didn't have to sign any letters of reprimand Lonnie was discharged following refusal and left before further counseling could be initiated. 7–12–89 Furthermore Lonnie stated that Richard Harris & L. C. Spann were his supervisors according to Earl Medlock. I explained to Lonnie that refusal was a discharge offense and he was discharged and had the right to contact Paula and set up a meeting to speak with Bob Maines. At that time I instructed Lonnie that he was discharged and to punch his timecard and leave the plant site.

Spann, like Lonnie Collins, was suspended from work on July 11. Following his suspension, Spann did not return to work until July 18 due to his suspension, illness, and vacation. On July 18 Bunyard presented Spann with the written warning for the July 11 incident:

> On July 11, 1989, L. C. Spann was seen off his route going to lunch at 10:40 AM. L. C. has been told that Ms. B's was off limits for lunch due to the amount of time it takes to get to and from that area. Also, the only time lunch can be bought there is when working at West Rankin Pumping Station. Lunch hour starts at 11:00 AM and ends at 12:00 PM with no exceptions unless otherwise discussed with me. Lunch hour is to be taken within the route designated only no exceptions. This is a letter of reprimand that will enter your personal file along with the rest of today's shift being suspended.

L. C. Spann testified about July 11:

> Collins and I were working in the McRaven area, and we ran out of gas in the company vehicle. We was able to get enough gas out of the lawnmower to get us to the Exxon, McDowell. This is where we purchase all of our gas.
>
> . . . .
>
> (We left the Exxon station at) approximately 10:37, according to the gas ticket that I purchased with Exxon.
>
> . . . .
>
> Collins and I, we went to Miss B's for lunch due to the fact that we didn't have a break that morning.
>
> . . . .
>
> Lonnie Collins and I, we purchased our lunch to go.
>
> . . . .
>
> When I got to Miss B's, there were some city workers there. Richard Harris was also there, another employee of ours.
>
> . . . .
>
> Collins and I, we went to a little park up here not far off Fortification. we call it Livingston Park (where we had our lunch).

After returning from lunch, Spann and Collins were called into the office, where each was called in before Supervisors Bunyard and Kiser. Spann testified:

> Bunyard began by asking me what time did I go to lunch that day, and I told him that I went to lunch early, and I tried to explain why I had went to lunch early, due to the fact that we ran out of gas. And he said, ''Well, I got you going to lunch at 10:40,'' and I told him that I was at the Exxon at that time, pretty much around that time. And he stated that he had had a meeting with Harris earlier, and he had suspended Harris, and he was going to have to go ahead and suspend me the rest of that day and the next day.

> And he stated that I was going to be wrote up for that, and he asked me some questions concerning Miss B's being off limits, which I wasn't aware of. I told him I didn't know.
>
> . . . .
>
> He said, ''Don't you remember when Earl Medlock told you Miss B's was off limits?'' And I told him I sure didn't.
>
> . . . .
>
> (After being suspended, Spann was at the truck), Bunyard came over and tried to talk to me. And he touched me, and I told him not to touch me. I told him to get his hands off me because ever since he'd been supervisor he'd been causing problems for me, and he said—and I didn't want it. He said, ''Look here, let me talk to you a minute.'' He said, You and Collins got caught up in the wrong thing at the wrong time. This wasn't for you all.''
>
> But, hey, he said something about Bob Maines had followed Richard Harris to Miss B's, and he had saw me at the Exxon, and he had got a call from Maines going to Miss B's where he knew that I was at the Exxon. And I showed him the ticket and everything, and he said, hey, we just got caught up at the wrong place, wrong time.

On cross-examination Spann testified that he did not have money to buy gas at a station near his route and, for that reason, he drove to the McDowell Exxon which is the only station where he could charge the fuel to Respondent. Spann testified that he may have had some cash, and, if Monday, July 10, was a pay day, that he ''probably'' did have some money.

Maines testified that both Spann and Collins were suspended on July 11 because of abuse of lunch hour.

The evidence is undisputed that Collins refused to sign the July 11 reprimand. According to Robert Maines, Collins told him that had not done anything wrong and that he had been advised by the union agent, Mr. Paige, not to sign anything.

Lonnie Collins testified that he received two warnings. The first occurred in June 1989, when a lawn mower locked up while being used by Collins. Collins signed that written warning. However, he testified that he was not told that he would be disciplined if he refused to sign.

Collins testified that the supervisors knew it was common practice for the employees to eat lunch at Miss B's. According to Collins, he was never told that Miss B's was off limits.

Maintenance Supervisor William Eckels admitted that until July 11, 1989, no member of a lift crew had ever been disciplined for abuse of lunchbreak. Eckels testified that he was aware before July 11, 1989, that Miss B's was a popular spot for lift station operators to take their lunchbreaks.

On July 26, 1989, L. C. Spann received two written reprimands and was suspended for 2 days. The reprimands alleged that Spann left a lift station unlocked and that Spann used a company vehicle off route on July 25 when he drove to a park for lunch.

On July 28, when Spann returned to work from his 2-day suspension, he was presented with the two reprimands. Spann was discharged because he refused to sign the reprimands. Robert Maines testified that Spann refused to either sign or return to Respondent, the two written reprimands presented to him by Supervisor Bunyard on July 28.

On August 7, 1989, Robert Bunyard, lift station supervisor, wrote a memo regarding the discharge of L. C. Spann:

> On July 28, 1989, L. C. Spann reported back to work after two day suspension. Mr. Spann was given the two letters of reprimand, one for Lift Station security and the other for use of company vehicle off route. Mr. Spann read both letters and refused to sign. I told Mr. Spann of the policy on refusal to sign reprimands. That signing the letter didn't mean that you agree with the letter; but that you've read the letter and refusal to sign was insubordination and a dischargeable offense. Mr. Spann was full aware of this and therefore was terminated. All of the above proceedings took place in the presence of Jackie Kiser. Mr. Spann refused to give the letters back.

The memo Spann received on July 26, regarding ''Violation of Lift Station Security,'' follows:

> On July 24, 1989, while installing watchman clock keys on the North route lift stations; I found that McRaven #2 control panel was not secure. This lift station does not have a fence around it, leaving exposed electrical equipment open to the public. After investigation of the incident, I found that L. C. Spann was the last operator to inspect that station.
>
> On June 22, 1989, a memo was issued stating the importance on lift station security. This memo was read and initialed by Mr. Spann on that date. Mr. Spann, was also in the process of training a new employee. This type of error can not be tolerated, especially when a new employee is looking to you for guidance. Mr. Spann has been questioned about this incident and feels confident that he secured this station. After investigation of all records, I can find no other employees to be involved with this station other than Mr. Spann on July 19, 1989 until July 24, 1989; when I myself did work there. Mr. Spann was placed on two days suspension until July 28, 1989.
>
> This is a letter of reprimand that will enter your personal file. I feel like this was an honest mistake on Mr. Spann's part, but when security of the station and safety to the public is involved its a mistake that will not be tolerated.

Spann's other July 26 memo follows:

> On July 25, 1989, L. C. Spann was assigned work at Will-O-Wood lift station. At 11:30 A.M., I pulled into Yarbro lift station to find Mr. Spann taking lunchbreak at a park next to Yarbro. This station is not near Will-O-Wood and is considered to be off route. There is a Dairy Queen 1/2 mile from Will-O-wood, and it would have made a lot more sense to go there and eat than to Metro Center, which is approximately five miles from Will-O-Wood.
>
> There seems to be some misinterpretation of where lunch should be taken. I might suggest lunch be brought from home to avoid confusion in the future. Mr. Spann was reprimanded two weeks ago for the

same action and this type of action needs to be corrected.

This is a letter of reprimand that will enter your personal file. Mr. Spann received two days suspension ending July 28, 1989, so no further disciplinary action will need to be taken on this matter.

On July 20, 1989, while Spann was working at the West Rankin station, Bunyard told him that he could eat lunch that day at Miss B's.

As shown above, Spann was reprimanded on July 26 for ''violation of lift station security.'' Spann was told that he had left a control cabinet open. According to Spann he told Bunyard that he did not leave the panel open. Bunyard told him that he would suggest to Bob Maines that Spann receive an oral warning. On July 25, while at a park near Yarborough, having lunch, Bunyard came by and talked with Spann. Spann testified that conversation included:

> [I asked Bunyard] did he hear anything else about the control cabinet. And he said Bob Maines was calling his lawyer, his attorney. He wanted to be legal about it. And if he found out anything else, he'd let me know, you know, later when we get in.

Later that day, around 3:30, Bunyard told Spann he would set up a meeting with Project Manager Maines about the control cabinet incident. Spann testified that his conversation with Bunyard continued:

> [Bunyard] asked me about the—he said, ''When I saw you guys at Yarborough on your lunchbreak, had you all gone to Revel before or after.''
>
> . . . .
>
> Revel Hardware is a hardware store where we purchase most of our miscellaneous parts. And I said, ''We went after we saw you at Yarborough.'' And then he said, ''Hey, look here, you were down at Yarborough; that's about four miles from Willow Wood. What were you doing down there?'' I said, ''Hey, we was having lunch.'' And he said, ''Hey, look here, I told you''—he said, ''Haven't I told you about the Miss B's?'' I said, ''Yeah, you told me about Miss B's.'' And he said, ''Well, look here, man, we're going to have to get this lunch thing straightened out, but, look here, you're not going to get a letter of warning or nothing for this, but, hey, we've got to work out something. I'm going to suggest that from now on maybe, you know, lunch be brought on the route from then on instead of riding that far away. I will issue a memo or something later on it.''

Subsequently, Spann, his helper, Young, and Bunyard met with Project Manager Bob Maines, in Maines' office:

> Young, he was sure that I didn't leave the (control cabinet) open. And, hey, Maines, he made a statement that he used to could step in and help, you know, in a situation like this, but he said twenty-two people were the reason he gave up that right.
>
> Q. And, to your knowledge, what was he referring to?
>
> A. Well, to me, twenty-two people voted for the union.
>
> . . . .
>
> [Maines] mentioned to Bunyard, ''What about the other one?'' And Bunyard said, ''Hey, we got that cleared up. It was just a little misunderstanding.''
>
> . . . .
>
> Maines wanted to talk to Bunyard alone. Young and I left, waited outside on Bunyard for the outcome.
>
> [A]bout ten minutes Bunyard, he came out, and he wanted to talk to Young and I, but he wanted to talk going back towards the van leaving Maines office. And he said, ''Hey, look, they want to let it stand just like it is on the control cabinet. You're going to go ahead and get a warning, reprimand, and you're going to be suspended for a couple of days. You're not going to report back to work until the 28th, and I have the reprimand ready for you.''

When Spann returned to work on July 28, he was given two reprimands by Bunyard. One, which is shown above, dated July 26, dealt with the control cabinet incident (G.C. Exh. 22), and the other dated July 26, dealt with Spann, along with Young, having lunch on July 25 (see above, G.C. Exh. 21). Spann testified that he was given the reprimands by Bunyard in Bunyard's office. He testified:

> I was upset about it because I was expecting one, and it was two. And I said, ''Hey, I'm not going to sign it.'' He told me to think about it because it was going to mean that I was going to be terminated if I don't sign it.

Spann was given an opportunity to reconsider but he persisted in refusing to sign the reprimands and was discharged. His testimony regarding the incident involving his discharge, included the following:

> I asked [Bunyard], ''Look, if I do sign these, will I be able to get a copy?'' And I believe he said, ''No, but you'll be able to look in your file. They'll be there, you know, in your file, anytime you want to look at it. You won't be able to get a copy.''
>
> And I think I made up my mind—anyway, I said I—I made up that I wasn't going to sign because—anyway, I didn't sign, and I think I told him I wasn't going to sign it. And he asked for the letters back, and I wouldn't give it to him.
>
> And he continued to ask for the letter, but I wouldn't give it to him. And, if I'm not wrong, I told him that he could take them if he really wanted them. I think I made a statement like that. And he said, ''Hey, you know I can't do that.'' So I told him, ''I guess I'm terminated. I guess I'll be leaving then.''

Maintenance Supervisor William Eckels admitted that until July 11, 1989, no member of a lift crew had ever been disciplined for abuse of lunchbreak. Eckels testified that he was aware before July 11, 1989, that Miss B's was a popular spot for lift station operators to take their lunchbreaks.

William Eckels testified that he and the then field supervisor, Earl Medlock, speculated that Spann and Lonnie Col-

lins might be for the Union in view of the fact that they worked with Richard Harris.

The record shows that from June 5 the newly promoted supervisor over the field crew, Tim Bunyard, set out on a campaign to crack down on the field crew. Bunyard felt that the field crew was engaging in undesirable work practices. Additionally, the record shows that Bunyard was motivated because of suspected union activities of the field crew.

In view of the mixed motivation behind Bunyard's crackdown, it was necessary for me to examine Bunyard's specific actions. As shown above, I found that Respondent illustrated that Bunyard's crackdown on the lunch period practice was justified in view of evidence showing that that change in policy would have occurred in the absence of protected activity. However, I found that Respondent failed to prove that the change in its policy of disciplining employees that refused to sign reprimands, was justified and that Respondent failed to prove that change would have occurred in the absence of protected activity.

The record shows that only two employees, Lonnie Collins and L. C. Spann, were ever discharged because they refused to sign written reprimands.

The record also shows that despite the numerous other disciplinary actions imposed against Collins and Spann during June and July 1989, Respondent relied solely on its contention that each of them was discharged for refusing to sign written reprimands.

The record illustrated that Spann and Collins were painted with the same brush that covered Richard Harris. Because of Harris, Respondent also suspected that Spann and Collins supported the Union.

Moreover, the credited evidence illustrates that but for its decision to discharge Harris in violation of Section 8(a)(3) of the Act, Respondent would not have suspended Collins and Spann on July 11. I credit the testimony of L. C. Spann that Bunyard told him that he had been caught up in an effort to get Richard Harris:

> (After being suspended, Spann was at the truck), Bunyard came over and tried to talk to me. And he touched me, and I told him not to touch me. I told him to get his hands off me because ever since he'd been supervisor he'd been causing problems for me, and he said—and I didn't want it. He said, ''Look here, let me talk to you a minute.'' He said, ''You and Collins got caught up in the wrong thing at the wrong time. This wasn't for you all.''
>
> But, hey, he said something about Bob Maines had followed Richard Harris to Miss B's, and he had saw me at the Exxon, and he had got a call from Maines going to Miss B's where he knew that I was at the Exxon. And I showed him the ticket and everything, and he said, hey, we just got caught up at the wrong place, wrong time.

I am convinced that the above comments by Bunyard, show that Spann and Collins were punished on July 11 because of Bunyard's, and Respondent's, concern that failure to punish them would adversely effect their case against Richard Harris. By that action, Respondent was also taking discriminatory actions against Collins and Spann.

The above and the entire record, shows that because of its concern with its ability to justify its discharge of Richard Harris; because of its imposition of an illegal rule requiring its employees to sign written reprimands; and because of its belief that Richard Harris had caused Spann and Collins to support the Union, Respondent discharged Spann and Collins.

As found above, Respondent promulgated its rule requiring discharge for refusing to sign reprimands, because of its suspicions regarding union activities of Richard Harris. That rule was found to have been illegally promulgated on June 27, 1989.

The Board, with support from circuit courts, has consistently found that an employer violates provisions of the Act when it disciplines employees because of violations of illegally motivated work rules. *Asociacion Hospital Del Maestro*, 283 NLRB 419 (1987); *Contemporary Guidance Services*, 291 NLRB 50 (1988); *Groendyke Transport, Inc. v. NLRB*, 530 F.2d 137 (10th Cir. 1976); *D'Yourville Manor, Lowell, Mass. v. NLRB*, 526 F.2d 3 (1st Cir. 1975).

Here, the record shows that Respondent changed its policy of requiring employees to sign written reprimands to one of discharging employees that refused to sign written reprimands, because of its suspicion of union activities by its field crew.

I find that General Counsel proved a prima facie case that Respondent was motivated by its antiunion animus to rid itself of the field crew of Harris, Collins, and Spann. The evidence illustrated that Respondent suspected that Collins and Spann favored the Union because of the influence of Richard Harris. Moreover, the record illustrated that Respondent took action against Collins and Spann in an effort to cover up its illegal actions against Richard Harris.

The evidence failed to show that Respondent would have discharged Collins and Spann in the absence of protected activities. In view of the fact that the rule requiring discharge on refusal to sign a reprimand, was found to be illegal, that rule cannot be used as valid justification for the discharges of Collins and Spann.

> Further, the Board found that since the no-distribution rule itself was unlawful, the rule was not a valid basis for Bynum's discharge. Accordingly the Board found that his discharge ''for passing out union literature'' violated section 8(a)(1) and (3) of the Act. [*Groendyke Transport, Inc. v. N.L.R.B.*, 530 F.2d 137, 142 (10th Cir. 1976).]

Respondent failed to show that Spann and Collins would have been discharged in the absence of protected activities. In that regard, Respondent failed to prove that Spann and Collins would have been suspended on July 11 absent its efforts to rid itself of suspected union pusher Richard Harris. Even though both Collins and Spann refused to sign written reprimands, Respondent failed to prove the rule requiring the signing of written reprimands on penalty of discharge, was justified on any bases other than illegal ones. In view of that rule being illegal, Respondent's use of the rule to justify the discharges of Collins and Spann, does not constitute a valid defense. Respondent failed to show that Spann and Collins would have been discharged in the absence of its employees' union activities. (*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462

U.S. 393 (1983); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987).)

H. *Brian King*

Brian King was discharged on October 2, 1989. Respondent's project manager Robert Maines responded yes to the following regarding the discharge of Brian King:

> So, then, you're saying with regard to the reasons for his termination, he was terminated for failure to stay out of the lab, and that caused him to be insubordinate, and that he was negligent on the job by sleeping and failure to perform his given duties?

The affidavit of Brian King was received in evidence over the objection of Respondent. King died before the hearing.[1]

In his affidavit King testified that he signed a union authorization card on May 25, 1989. King testified that he started wearing a union Local 891 cap to work around the beginning of August 1989. Project Manager Maines and Maintenance Supervisor Eckels testified that they were unaware of King's union activities. However, both admitted that they knew that King wore a union ball cap to work.

King admitted that he had received several warnings before his union activities including one around May 1, 1989, when Respondent's lawn tractor ran out of oil. King was using the tractor at the time and he admittedly failed to check the oil even though it was part of his job to check the oil.

On August 28, 1989, according to King, he was told by Lab Supervisor Kelvin Peters, that he was not supposed to be in the lab. Subsequently, around September 26, King went to the lab door. He testified that Lab Supervisor Peters came up and asked him what he was doing in the lab. King told Peters that he was looking for Bernard Bennett. Peters told King that Bennett ''wouldn't have any business in the lab either.'' King left but he was called in by his immediate supervisor, Bill Eckels. Kelvin Peters was with Eckels. Eckels told King to leave and return on October 2, when he would be told of the results of an investigation into ''insubordination.''

Laboratory Technician Chester Hicks also testified about the day Brian King was suspended,

> The morning of September the 26th—Brian King was the utility man there at the plant, he cleaned, swept and emptied the trash in the lab—and on that morning of September the 26th, Brian King came to the lab door, never did enter the lab, but he asked Tommy Wash and myself, which was standing at the sink in the lab, and that is right at the door. He asked Tommy and myself had we seen Bernard Bennett. And as Tommy and myself was telling him, no, we hadn't seen Bernard, Kelvin Peters came off the elevator. And he asked Brian, ''Brian, what are you doing in the lab?'' Brian said, ''Kelvin, I wasn't in the lab.'' Then Tommy and myself told Kelvin, ''Kelvin, he wasn't in the lab.'' And at that point, Kelvin didn't say anything else. He went into his office, and Brian also left.
>
> . . . .
>
> Later that morning [Kelvin Peters] come back and say, ''Chester, was Brian in the lab?'' I said, ''No, Kelvin, he was not in the lab.''

Tommy Wash testified about the incident between Brian King and Kelvin Peters on the last day King worked:

> [Kelvin Peters] told Brian that he had told him to stay away from the lab, stay out of the lab, that he was detaining the employees from doing their work. Brian repeated that he wasn't in the lab and said he was looking for Bernard Bennett. And Kelvin told him that Bernard Bennett didn't work in the lab.

Wash testified that a few minutes after Brian King left,

> [Peters] asked me how long was Brian in the lab, and I told him that Brian wasn't in the lab, he had just approached the door looking for Bernard.

Laboratory Supervisor Kelvin Peters testified that he caught King inside the laboratory on September 26, 1989. When Peters confronted King, King told him that he was looking for ''Bernard.'' According to Peters, neither Tommy Wash nor Chester Hicks, who were in the lab when he found King there on September 26, denied that King had been in the lab.

Hicks testified that Brian King did cleaning chores in the lab until September 14, 1989:

> Up until September 14th when Kelvin came to James Varnado and myself and told us that he no longer wanted Brian to come in the lab, that him and I would have to do the cleaning, the mopping and other things that he did in the lab.
>
> Q. Did he say why?
>
> A. Yeah. He said because some things had been coming up missing.

James Varnado, who maintained a log of events, testified in agreement with Hicks, that Brian King performed clean up duties in the lab until September 14, 1989. On that day Kelvin Peters told Varnado and Chester Hicks that they would have to start mopping, sweeping, and emptying the trash and that he did not want Brian King in the lab anymore because some things had come up missing.

According to Hicks, Brian King continued his duties of cleaning the hallway immediately outside the laboratory, after September 14, 1989, until his discharge.

Tommy Wash agreed with Hicks that Brian King had been relieved of his duties in the lab. However, Wash recalled that King had been told to stay out of the lab shortly after the election. Wash testified that he was told that King would no longer clean in the lab, around 2 weeks after the July 11, 1989 election.

Hicks testified that there is a sign on the lab door stating, ''Authorized personnel only.'' However, according to Hicks, it is not unusual for other employees, both supervisors and nonsupervisory employees, to come into the lab. Hicks testified that Peters did not ask any of those other employees to leave the lab. On cross-examination, Hicks admitted that he

[1] Although Respondent objected to the receipt of Brian King's affidavit, Respondent offered the affidavit of former employee Ken Thomas on the assertion that Thomas was unavailable. Thomas' affidavit was received over the objection of General Counsel.

was unaware that any of the employees he named as coming into the lab, were ever there in the presence of Supervisor Kelvin Peters. However, Tommy Wash corroborated Hick's testimony regarding other employees coming into the lab and Wash testified that Kelvin Peters was present on occasion when other employees were in the lab. Peters never asked any of those other employees to leave the lab.

James Varnado agreed that other employees occasionally came into the lab. Varnado testified that nonsupervisory employees Freddie Johnson and Jason Dominick came into the lab once or twice a week since the election. According to Varnado, Kelvin Peters was in the lab occasionally, when Johnson and Dominick came into the lab. However, Varnado testified that the nature of Jason Dominick's job requires him to come into the lab on occasion.

Tommy Wash testified that although Bernard Bennett did not work in the lab, Bennett occasionally came into the lab and talked with the lab employees. Wash recalled that Bennett was in the lab occasionally at the same time Kelvin Peters was in the lab.

According to King, he was warned in 1986 and again, in 1987, by Kelvin Peters, about being in the lab without authorization. Immediately before the NLRB election on July 11, 1989, King's job duties included cleaning up the lab each morning. King testified that the job in the lab took about 45 minutes each day. After the election, that job was performed by lab technicians.

As shown above, the former field maintenance supervisor, Earl Medlock, testified that after an employee meeting in which Respondent's president, Jerry Mitchell, spoke to employees on April 4, 1989, he was called into Bill Eckels' office. Among other things the conversation between Eckels and Medlock included Eckels commenting:

> There are some people in maintenance, and you know them, that are pro-union.'' And I told Bill, ''Well, I don't know anybody,'' because I didn't know anything about the letter or the people hadn't been saying anything. He said, ''You know then. One of them is Richard Harris.''
>
> . . . .
>
> And [Eckels] talked about another fellow that worked there at the administration building that was more or less a janitor.
>
> . . . .
>
> Well, he said he was very rebellious and that he was against everything that McCullough was standing for and that if anybody had anything to do with the union he would be one of them. And he was planning on keeping his eye on Richard Harris and this fellow. For the life of me, I just can't think of his name right now.
>
> Yeah, it was Brian King, that's who it was.

William Eckels agreed that he and Earl Medlock did speculate that Brian King may have been involved with the Union.

Respondent contends that King was excluded from the lab because it was concerned with security. On July 12, 1989, it was brought out during a staff meeting that the door locks on Project Manager Maines' automobile, were sealed with super glue while the car was parked at Respondent's plant.

Maintenance Supervisor Eckels testified that because of the incident involving the super gluing of Maines' car, it was decided that Brian King would be prohibited from going into the laboratory. Although Respondent did not, until after King's discharge, actually know that King was involved in gluing the locks on Maines' car, King was suspected. King was the only employee whose work placed him in the area where Maines' car was parked.

Former employee Jeffrey Scott Harrison testified that King admitted to him, that King had super glued Maines' door locks. However, Harrison testified that he said nothing to Respondent about King's admission about the super glue, until after King had died, well after King was discharged by Respondent.

Despite the prohibition against King, Respondent continued to have problems with King entering the lab. William Eckels testified that he was instructed to talk with King regarding the prohibition. Eckels called King in and discussed the matter with King on August 29, 1989. King told Eckels that he would stay out of the lab.

Nevertheless, in late September, Eckels received a report from Supervisor Kelvin Peters, that Brian King had been found in the lab. According to Eckels, Brian King had no business in the lab on that occasion in September 1989. Eckels testified that there was no reason why King would be looking for Bernard Bennett in the lab, as claimed by King. Bennett did not have occasion to be in the lab during the time King was there looking for him.

Maintenance Supervisor William Eckels testified:

> Q. Now, was there also speculation that Brian King might be involved in the union?
>
> A. Yes, there was.
>
> Q. And what was the speculation between you and Mr. Medlock about Brian King?
>
> A. Well, he used to go drinking with Richard [Harris] and all that stuff, and also with Earl, and he was kind of a—he was an anti-establishment kind of guy—Brian was.

The evidence is in dispute as to whether Brian King was actually in the laboratory on September 26, 1989.

However, there is no dispute that King was found at or inside the laboratory door speaking to two of the employees in the laboratory. King had been told on several occasions going as far back as 1986 according to his own testimony, that he was to stay out of the laboratory unless he had authorization to be there.

In either July or September 1989, according to different testimony, King was told to stay out of the lab altogether.

According to the testimony of Maintenance Supervisor Eckels, whom I found to be a reliable witness, King was told to stay out of the lab during July 1989. Subsequently, on August 28, 1989, King was reprimanded as follows:

> At approximately 9:05 a.m. on this date I observed Brian King in the laboratory talking to Tommy Wash as he was working on the BOD test. I asked Mr. King if he had any business in the lab and he stated that he was just talking to Mr. Wash. I informed him that this was not ''break time'' for Mr. Wash and he is not to bother people while they are working. This is the third verbal warning I have given Mr. King about his unauthorized presence in the laboratory with regard to his

> lunch and breaktimes. I request formal disciplinary action to be taken against Brian King for insubordination.

A note was attached to the reprimand initialed by Robert Maines, stating:

> Bill, please see Kelvin [Peters] for situation. See me after investigation for appropriate action.

William Eckels wrote below Maines' note:

> Bob—I talked with Kelvin. He stated that he has informed B. King 4 times in the past to stay out of the lab.
>
> I informed B. King to stay out of the lab unless instructed to do so.

There is no contention that King was excluded from the lab because of union or protected activities. This is not a case where an employer allegedly sought to keep King away because of fear of organizing activities.

In fact there was no dispute regarding the reason why Respondent banned King from the lab. Respondent claimed that King was banned because of a concern with security. King was suspected of the super glueing of Project Manager Maines' car. Moreover, there was concern that someone may have been taking a number of items which were missing from the laboratory.

Respondent's contention as to why King was expelled from the lab was, as shown above, supported by the testimony of Chester Hicks who was identified by the union business agent as an employee organizer on the day of the election:

> Up until September 14th when Kelvin came to James Varnado and myself and told us that he no longer wanted Brian to come in the lab, that him and I would have to do the cleaning, the mopping and other things that he did in the lab.
>
> Q. Did he say why?
>
> A. Yeah. He said because some things had been coming up missing.

In view of the entire record and especially the evidence mentioned above, I find that Respondent excluded Brian King from its laboratory because of business related reasons.

In view of my finding, I find nothing wrong in Respondent permitting other nonlaboratory employees to enter the laboratory during the time when it was excluding King. There was no showing that Respondent discriminated against King in that regard because of protected activities of King or other employees.

Despite my determination that Respondent did nothing illegal in banning King from the laboratory, there remains a question of Respondent's justification in discharging Brian King.

There was evidence that Respondent suspected that King may have been a union supporter. According to the testimony of Earl Medlock which was corroborated by Supervisor William Eckels, King was suspected because of his rebellious attitude. Additionally, King, like several other employees, wore a union cap to work.

Despite the evidence that Respondent suspected that King supported the Union, there is little else which shows that Respondent was motivated to discharge King because of the Union. I must also consider the evidence which shows that Brian King continually disobeyed Respondent's instructions to stay out of the lab without authorization.

I am not persuaded that evidence which conflicts with the testimony of Laboratory Supervisor Peters, and shows that King was not actually inside the laboratory on September 26, is actually critical. Without regard to whether King was actually inside the laboratory, the evidence is uncontested that King was at the laboratory door on that occasion questioning two laboratory employees, who were at work, about another employee that did not work in the laboratory.

As shown above, the September 26 incident was very similar to the occasion on August 28, 1989, when Laboratory Supervisor Peters reprimanded King because he was in the lab talking with lab employee Tommy Wash. According to the August 28 reprimand, that was the fourth occasion of Peters warning King to stay out of the lab.

Brian King admitted that he was warned about being in the lab without authorization on three occasions before 1989. He also admitted that he did the lab janitorial work before the election but, after the election, that work was done by the laboratory technicians. That testimony agrees with Respondent's evidence that King was directed to stay out of the lab after he was suspected of gluing Maines' car on July 12.

On August 28, 1989, Brian King was again warned about being in the laboratory without permission. Finally, on September 26, King was again found in or at, the laboratory talking with two laboratory technicians.

Unlike the situation involving Richard Harris, there is no showing that King was treated in a disparate manner. Instead of permitting King to visit the lab without authorization as was the case in Harris taking lunch at Miss B's, Respondent consistently warned King about that rules' infraction.

On August 28, when King received a written warning, the NLRB election had been over for a month and a half. If, as argued by General Counsel, Respondent was motivated by King's union involvement, it was so motivated on and before August 28. Nevertheless, King was not discharged when he was found in the laboratory on that occasion.

An employer is not required to tolerate rules infractions from an employee that supports the union, to any greater extent than it tolerates employees that do not support the union. Here, there was no showing that Brian King was subjected to unusual measures. I find that the evidence shows that Brian King would have been discharged in the absence of his union or suspected union activities. Therefore, I find that the record does not support a finding that he was discharged in violation of Section 8(a)(1) and (3) of the Act. (*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas, Inc*., 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987); *Alcoholics Anonymous World Services*, 288 NLRB 582 (1988); *Lewis Grocer Co*., 282 NLRB 166 (1986); *Williamson Piggly Wiggly*, 280 NLRB 1160 (1986); *State Bank of India*, 283 NLRB 266 (1987); *Marico Enterprises*, 283 NLRB 726 (1987); *Evans St. Clair, Inc*., 278 NLRB 459 (1986)); *Sioux Quality Packers v. NLRB*, 581 F.2d 153 (8th Cir. 1978); *Rickel Home Centers*, 262 NLRB 731 (1982); *Florida Steel*

Corp. v. NLRB, 529 F.2d 1225 (5th Cir. 1976); *Chemvet Laboratories v. NLRB*, 497 F.2d 445 (8th Cir. 1974).

III.

Section 8(a)(1), (3), and (4)

James Varnado

It is alleged that Respondent reprimanded Varnado in violation of Section 8(a)(1), (3), and (4) of the Act. Section 8(a)(4) prohibits discriminatory treatment on the grounds of the filing of charges or the giving of testimony under the Act.

Varnado was the subject of earlier charges alleging that he was disciplined because of union activities.

On April 23, 1990, James Varnado testified in the instant hearing.

James Varnado is employed by Respondent as a laboratory technician. Before May 31, 1990, Varnado's duties included routine analysis of samples. Until February 1990, Tommy Wash had the responsibility of testing ''field'' samples and Varnado was responsible for ''laboratory'' samples. From February until May 1990, Wash was replaced by David Canizaro.

Occasionally, according to Varnado, he would assist Wash or, subsequently, Canizaro, pursuant to their request for him to conduct a specified test on a field sample.

When Canizaro left that job, Laboratory Supervisor Kelvin Peters told Varnado that he and Chester Hicks, would have to help out with field samples. Varnado testified that he learned the job as he went along.

On May 31, 1990, Kelvin Peters issued a written reprimand to Varnado:

> On Thursday, May 24, 1990 you reported to me that you had not performed an Ammonia Nitrogen analysis on the Gulf States Canners composite sample collected the week before. You stated that you ''did not know'' you were supposed to do the test on this sample. The sample had been discarded. After investigating your claim I found your explanation to be unfounded as you are documented as having run this same test on the same kind of sample.
>
> The required testing was not performed due to your negligence. You have been previously warned for failure to perform required testing. For this reason you are officially reprimanded. Your are to take immediate corrective action to prevent any future occurrences of this nature. Due to the severity of failure to perform required testing, another occurrence will result in more severe disciplinary action.
>
> Signing below acknowledges your receipt of this document.

Varnado testified that the above reprimand resulted from a directive he received from Peters on May 18, to run ''BODs and total suspended solids'' on a Gulf States Canners sample. Varnado ran the specified tests. However, the next week Peters came to him with another Gulf States Canners sample and told him to run ''BOD, suspended solids and ammonia nitrogen.'' After discussing his concern with fellow employee Chester Hicks, Varnado went to Peters and asked Peters if Peters had also intended for him to make those three tests, including ammonia nitrogen, on the May 18 sample.

Chester Hicks corroborated Varnado's testimony. Hicks testified that after Peters brought the sample to Varnado, Varnado asked him if he thought that Peters had intended for him to run three tests including ammonia nitrogen, when Peters had brought Varnado a Gulf States Canners sample on May 18. At that time, Varnado had not been trained by Peters, on how to conduct the Gulf States Canners tests.

Peters told Varnado that he should have conducted all three tests, including ammonia nitrogen, on the May 18 sample. Consequently, Varnado was given the above reprimand because he had failed to conduct the ammonia nitrogen test. When Peters gave Varnado the reprimand, Varnado replied that he had not been told to run the ammonia nitrogen test on the May 18 sample. Peters testified that despite Varnado's contention to the contrary, Varnado had previously conducted tests on a Gulf States Canners sample during November 1989.

Kelvin Peters admitted on cross-examination, that the sample which Varnado ran in November, was conducted pursuant to specific directions from either Peters or Tommy Wash. At that time Varnado was not primarily responsible for running field samples. Before May 1990, Varnado's duties did not include an understanding of which tests were required on each of numerous samples from different offsite facilities. Peters admitted that the permits for the several different facilities covered by Respondent, required different tests for each respective facility. The number of facilities varied from six to seven and, until he was assigned to help with the field samples, Varnado was not expected to know which tests were required for each specific facility.

On May 18, Varnado had been told only that he and Chester Hicks, would have to help out with the field. Varnado had not, at that time, been to the Gulf States Canners site and no one had explained what tests were required at Gulf States Canners.

Tommy Wash testified in corroboration with Varnado. Wash was formerly the field operator. Wash had the responsibility of testing samples from seven different field facilities. Wash testified that each of those seven facilities, required its own particular tests. Each facility was required to possess its own State of Mississippi permit. The particular permit specified which tests were required for that particular facility. Wash was supplied with copies of the permits by his supervisor.

Kelvin Peters was Wash's supervisor while Wash was the field operator. According to Wash, his training was conducted on the job. He was trained by Supervisor Kelvin Peters.

Wash agreed with Varnado, that occasionally he would ask a laboratory technician, either Varnado or Chester Hicks, to help him by conducting tests. Wash recalled that he never asked a laboratory technician to run an entire series (i.e., all the tests required by the permit on a particular facility). Instead Wash asked, on those occasions when he needed assistance, for the laboratory technician to run a test or tests, which Wash specified.

Varnado received what Respondent characterized as a written counseling report, on March 8, 1990. Both Varnado and his coworker, Chester Hicks, were awarded counseling reports on that occasion allegedly for failing to conduct re-

quired tests during February 1990, on samples from A.E. Staley. Varnado testified that he and his coworker, Chester Hicks, had discussed the Staley sample at issue, and had decided that between them, they had run all the Staley tests on the February sample. According to Varnado, Peters brought the March 8 counseling report and asked him and Hicks to read it. Afterward Peters asked if they had questions. Varnado did not ask any questions. However, Varnado was confused by Peters' comments that the report would be placed in his file. On the next day Varnado asked Peters for a copy of the report. Peters responded,

> James, I told you yesterday—but in a louder tone of voice and pointing his finger—James, I told you yesterday that it was a reprimand—I mean, a memo and not a reprimand.
>
> He went on to say that I was trying to manipulate him, and I told him that I wasn't. And he came from one side of the lab to where I was pointing his finger, and I spoke and said, Kelvin, I am not afraid of you.
>
> And he said, Oh, are you into that now.
>
> And I said, No, I am not.
>
> And he went on to say that he wasn't going to tolerate me talking to him that way, and he left. And came back and said that he had put something in my file concerning the little talk he just had—the talk he had with me here—the talk he had just finished with me.

Varnado went to Project Manager Maines and asked to see what Peters had placed in his file. Varnado learned that Peters had written and placed in Varnado's file, the following memo dated March 9, 1990:

> On this date at approximately, 9:30 am James Varnado confronted with a belligerent tone stating ''am I going to receive a copy of the thing we got yesterday, the memo or warning or reprimand or whatever it was.'' My response was that I had specifically told him that he was not being reprimanded in the memo. He stated that I had not told him this. I again responded by telling him that they were not being reprimanded while both Chester Hicks and Varnado were at the front sink of the laboratory reading the memo. James than stated that he didn't hear that even though we were all standing with two feet of each other when I told them the memo was not a reprimand, but was to let them know of the importance of doing the work required. He then James then went on to make statements of how he wasn't afraid of me and that I was trying to argue with him. I then gave James Varnado a verbal warning and told him that it was a verbal warning about the manner in which he conducted himself with his supervisor. He had tried to twist and manipulate what I had told them into something untrue and that would not be tolerated. I asked Varnado if he understood what I had told him. He did not respond. I asked him again if he had understood what I had told him and demanded response. He then said he understood what I had told him.

As shown above, Respondent's employees voted in a Board-conducted election at its facility in Jackson, Mississippi, on July 11, 1989. After the election, several employees met with news people in Respondent's conference room, regarding the Union's victory in that election. Several of Respondent's supervisors observed particular employees that attended that news meeting. Chester Hicks, Tommy Wash, and James Varnado, testified that in addition to Union Agent Kenneth Paige, there were several employees at that news interview at Respondent's facility, including James Varnado.

Varnado testified that he wore a union cap to work, placed the union cap in the back window of his car, and placed a union bumper sticker on his car.

James Varnado was called by General Counsel and testified in these proceedings on April 23, 1990, and again on November 28, 1990.

On August 18, 1989, the Union filed a charge with the NLRB (Case 15–CA–10961) alleging that Respondent took discriminatory action against Varnado. On September 1, and on November 1, 1989, the Union amended its charge in Case 15–CA–10961, again alleging that Respondent discriminated against Varnado among others.

According to Laboratory Supervisor Kelvin Peters, Peters reprimanded Varnado on March 9, 1990, because,

> James came to me and asked if he was going to receive a copy (of the memo I issued the previous day indicating that he and Chester Hicks had failed to run required test), . . . in a belligerent tone.
>
> Then I reminded him I had specifically told him he was not being reprimanded and that was a memo. And he said he didn't hear that even though we were standing—when we had discussed that, we were all standing within arms length of each other.
>
> [He] said he wasn't afraid of me and that I was trying to argue with him.

As to the May 31, 1990 reprimand which Peters awarded Varnado for failure to run an ammonia nitrogen analysis on a Gulf States Canners sample, the evidence is uncontested that Peters did not specify to Varnado that he run ammonia nitrogen. According to Varnado's testimony, Peters brought him that particular Gulf States Canners sample and told him to run ''BODs and total suspended solids.'' Peters testified that Varnado should have known to run the ammonia nitrogen analysis in addition to the BOD and suspended solids, because his records indicated that Varnado had previously run a Gulf States Canners sample back in November 1989.

As shown above, during November 1989, Varnado occasionally ran field samples pursuant to the specific directives of Tommy Wash.

Respondent offered a number of reprimands which Peters issued to employees before March 1990. Those reprimands included a January 8, 1990 reprimand to Tommy Wash for excessive nonwork related talking over a period of 1 hour and 15 minutes; a September 18, 1989 reprimand to Charles Johnson because Johnson intimidated Peters on two occasions by blocking Peters' path, forcing Peters to walk around Johnson; an October 19, 1989 reprimand to Bernard Bennett because Bennett shirked his responsibility by refusing to sign for a UPS package; a September 4, 1990 verbal warning to Chester Hicks for failure to perform a final effluent D.O. test; a June 19, 1990 reprimand to Donnie Dixon because Dixon was disrespectful to Peters and because Dixon distracted technicians from their duties; and a March 2, 1990

reprimand to Donnie Dixon for failure to properly communicate to Peters.

Only the September 4, 1990 reprimand to Chester Hicks, is similar to either of the Varnado reprimands which allegedly constitute violative action. That reprimand includes the following comments, among others:

> Hicks admitted that he thought of getting the D.O. [test], but did not, assuming that it was not necessary on holidays since they are worked much like the weekend work. Hicks negligence could have easily been avoided had he followed my instructions to contact myself or the manager if he was unsure of his responsibilities. Hicks told me he understood the reason for the warning and he would make an effort to improve his work in this area. Hicks was told that this summation of the verbal warning would be placed in his personnel file and he could review it with the manager if he desired.

In both instances involving Varnado, there appears to be a question of merit. As to the March 9, 1990 reprimand, Peters' testimony shows that he reprimanded Varnado because Varnado asked for a copy of a personnel file memo, in a belligerent tone; and because Varnado told Peters that he did not know, or did not hear Peters say, that memo was not a reprimand.

As to the May 31, 1990 memo, Peters does not contest that Varnado was not told to run the ammonia nitrogen tests. However, according to Peters, Varnado, who was untrained on field samples, should have know to run the ammonia nitrogen test because he had run a Gulf States Canners sample in November 1989.

As shown above, Peters previously engaged in conduct violative of Section 8(a)(1) by chastising Chester Hicks because he felt Hicks was untruthful regarding the role Hicks played for the Union.

Respondent was aware of Varnado's support for the Union from, at least, July 11, 1989, and it was aware of the charges which had been filed alleging that it had discriminated against Varnado.

The question I must decide is whether General Counsel has proved a prima facie case by showing that the reprimands issued to Varnado constitute violative conduct.

I realize that it is not my job to determine merit in regard to an employer's reprimand of an employee. However, I must determine merit to the extent that question relates to discriminatory conduct. Here merit, when used to question whether the reprimands issued Varnado, raise to the standard of previously issued reprimands, is a necessary issue. In that regard an examination of the reprimands previously issued by Peters, failed to show that he previously disciplined anyone because they questioned whether a writing filed in their personnel folder constituted a reprimand and Peters had not previously reprimanded anyone because they failed to conduct a test under circumstances similar to those present on May 31, 1990, regarding Varnado.

Of all the reprimands issued by Peters, the only previously issued reprimand of a similar nature was the reprimand issued to Chester Hicks on September 4, 1990. That reprimand to Hicks, involved a test which Hicks admitted he should have run. There was no dispute but that Hicks should have, at least, phoned Peters to see if the test should be run under the holiday schedule. In the instant situation, Varnado claimed that he did not know that he should have conducted the ammonia nitrogen test.

Peters demonstrated that he expected Varnado to understand field testing on the basis of a single test Varnado allegedly conducted on a Gulf States Canners sample during November 1989.

A comparison of the other reprimands issued by Peters and the full record, calls into question whether Varnado's actions were being judged by Peters in the same manner and with a similar standard, as was applied by Peters to other employees. The record illustrated that such was not the case. No other laboratory employee was held to such a high standard as was Varnado during March and May 1990.

I find that the record shows that Respondent was aware of Varnado's union activities; was aware of the charges previously filed alleging discrimination against Varnado; and was aware of his April testimony in these proceedings, when it reprimanded him on May 31, 1990. The record showed that both the March and May reprimands involved standards which Respondent had not applied to any other employee. On that basis I find that General Counsel proved a prima facie case of discrimination.

Respondent did not show that Varnado would have been disciplined in March or May 1990, absent his protected activities. (*Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Delta Gas*, 283 NLRB 391 (1987), enfd. 840 F.2d 309 (5th Cir. 1988); *Southwire Co. v. NLRB*, 820 F.2d 453 (D.C. Cir. 1987).)

CONCLUSIONS OF LAW

1. McCullough Environmental Services, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters Local Union No. 891, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by interrogating its employees about their union activities; by creating the impression of surveillance of its employees' union activities; by threatening its employees with reduction in work hours if they selected the Union as their bargaining representative; by threatening that it would fire other employees because of their union activities; by threatening its employees with more onerous working conditions if they selected the Union; by threatening its employees with unspecified reprisals because of their union activities; and by promulgating and enforcing a no-solicitation rule against its employees' union activities; has violated Section 8(a)(1) of the Act.

4. Respondent, by implementing a rule requiring the discharge of employees that refused to sign written reprimands; by reprimanding employee Bernard Bennett because he solicited for the Union; and by discharging employees Richard Harris, Lonnie Collins, and L. C. Spann, because of its employees' activities on behalf of Teamsters Local Union No. 891, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, has violated Section 8(a)(1) and (3) of the Act.

5. Respondent, by reprimanding its employee James Varnado because of its employees' union activities, because of charges filed alleging discriminatory action against Varnado and because Varnado testified in NLRB proceedings, has engaged in conduct violative of Section 8(a)(1), (3), and (4) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has illegally reprimanded and discharged its employees in violation of sections of the Act, I shall order Respondent to offer Richard Harris, Lonnie Collins, and L. C. Spann, immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. I further order Respondent to make Harris, Collins, and Spann whole for any loss of earnings they suffered as a result of the discrimination against them and that Respondent remove from its records any reference to the unlawful reprimands against its employees Bernard Bennett and James Varnado, and discharges of Harris, Collins, and Spann, and notify Bennett, Varnado, Harris, Collins, and Spann in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, McCullough Environmental Services, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union activities; creating the impression of surveillance of its employees' union activities; threatening its employees with reductions of work hours, with discharging other employees, with more onerous working conditions, and with unspecified reprisals if its employees selected Teamsters Local Union No. 891, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as their collective-bargaining representative; and promulgating and enforcing a rule prohibiting its employees to solicit on behalf of the Union.

(b) Reprimanding or discharging its employees because of their protected activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Richard Harris, Lonnie Collins, and L. C. Spann immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make Harris, Collins, and Spann, whole for any loss of earnings plus interest, they suffered by reason of its illegal actions.

(b) Rescind its discharge, and warnings issued to Richard Harris, Lonnie Collins, L. C. Spann, Bernard Bennett, and James Varnado, and remove from its files any reference to its warnings and discharge of Harris, Collins, Spann, Bennett, and Varnado, and notify each of them in writing that this has been done and that evidence of its unlawful actions will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Jackson, Mississippi, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''